(1)

85-1585

No. .....

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

—o—

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO, BORGER POLICE OFFICER JOHN WAYNE TURNER, BORGER POLICE OFFICER BAILEY HAL ROBERTS, AND BORGER POLICE OFFICER JOHN RAY,

Petitioners,

vs.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LAJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J. H. GRANDSTAFF,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

Wayne P. Sturdivant
Gibson, Ochsner & Adkins
500 First National Bank Building
Amarillo, TX 79101
(806) 378-9714

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether an unconstitutional policy or practice sufficient to impose liability upon a municipality can be inferred by the City's policymaker's conduct subsequent to a single isolated incident.

2. Can 42 U.S.C. § 1983 liability be imposed upon police officers when the officers had probable cause to make an arrest and were justified in using deadly force against the person they were arresting, and used no more force than was necessary, because such use was reckless and maliciously, wantonly, or oppressively done?

3. In a mistaken identity case may the police officers be held liable for money damages, even though there was no evidence or jury finding that the officers were lacking in good faith?

4. Where there are multiple defendants, should liability for damages imposed pursuant to 42 U.S.C. § 1983 be joint and several?

THE PARTIES

The petitioners in this proceeding are The City of Borger, Texas, Borger Police Officer John Robert Alonzo, Borger Police Officer John Wayne Turner, Borger Police Officer Bailey Hal Roberts, and Borger Police Officer John Ray. Respondents are Sharon Grandstaff, Individually and as Representative of the Estate of James C. Grandstaff, and as Next Friend of Randy Glenn Gatlin, a Minor; Kay LaJune Grandstaff, as Next Friend of Jo Cheryl Grandstaff, a Minor; Charles Robert Gatlin; and J. H. Grandstaff.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	ii
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Reasons for Granting Writ	2
Statement of the Case	3
Argument:	
Municipal Liability	8
Liability of the Defendant Borger Police Officers	18
Joint and Several Liability	25
Conclusion	26
Appendix:	
Opinion of the United States Court of Appeals for the Fifth Circuit, August 5, 1985	App. 1
Judgment of the United States Court of Appeals for the Fifth Circuit, August 5, 1985	App. 32
Opinion of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc, January 8, 1986	App. 34
Charge to the Jury, United States District Court for the Northern District of Texas, February 3, 1984	App. 44
Verdict of the Jury, February 3, 1984	App. 53

TABLE OF CASES

Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980) 24

Davis v. Scherer, 468 U.S. —, 104 S.Ct. —, 82 L.Ed.2d 139 (1984) 23

Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) 23

Dobson v. Camden, 705 F.2d 759 (5th Cir. 1983), *rehearing granted en banc*, 709 F.2d 7 (5th Cir. 1983), *affirmed*, 725 F.2d 1003 (5th Cir. 1984) 25

Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982) 23

Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) 23

Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) 8, 12, 13, 15

Helms v. Harris, 281 S.W.2d 770 (Tex. Civ. App. —Fort Worth 1955, writ ref'd n.r.e.) 19

Hunter v. Clardy, 558 F.2d 290 (5th Cir. 1977) 21

Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) 12

Languirand v. Hayden, 717 F.2d 220 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 2656 (1984) 16

Mariani v. City of Pittsburgh, 624 F.Supp. 506 (W.D.Pa. 1986) 12

Neubauer v. City of McAllen, Texas, 766 F.2d 1567 (5th Cir. 1985) 25

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 62 L.Ed.2d 420 (1981) 24

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 23

Polk Co. v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) 10

TABLE OF CASES—Continued

Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982) 23

Tennessee v. Garner, 471 U.S. —, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985) 21

Terket v. Lund, 623 F.2d 29 (7th Cir. 1980) 21

Webster City of Houston, 735 F.2d 838 (5th Cir. 1984) (en banc) (per curiam), *rev'd on other grounds*, 739 F.2d 993 (5th Cir. 1984) (en banc) 16

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

Texas Penal Code § 9.05, Vernon's Texas Codes Annotated 18

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners file this petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part and modifying in part Judgment for respondents for damages resulting from 42 U.S.C. § 1983 liability of the petitioners, The City of Borger, Texas, Borger Police Officer John Robert Alonzo, Borger Police Officer John Wayne Turner, Borger Police Officer Bailey Hal Roberts, and Borger Police Officer John Ray.

———o———

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in the Appendix at App. 1.

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Suggestion for Rehearing En Banc is printed in the Appendix at App. 34.

———o———

JURISDICTION

The Judgment of the Court of Appeals was entered on August 5, 1985, and is printed in the Appendix at App. 32. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is dated January 8, 1986, and is printed in the Appendix at App. 34.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983, which reads as follows:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

—o—

REASONS FOR GRANTING WRIT

The decision of the Fifth Circuit departs from accepted and established rules of law which control the liability of a municipality and its police officers pursuant to the provisions of 42 U.S.C. § 1983, and establishes a new definition of "policy" which can lead to municipality liability not previously recognized by either the Supreme Court of the United States, the United States Court of Appeals, Fifth Circuit, or any other United States Court of Appeals; creates confusion as to the proper definition of "policy," and the quantum of evidence necessary to establish a policy; and permits an ad hoc determination of 42 U.S.C. § 1983 liability.

The Fifth Circuit decision is erroneous on the facts and on the law, ignores the findings of the jury, and should

be reversed to prevent the creation of further confusion among the Courts as to the guidelines to be followed in determining § 1983 liability.

———o———

STATEMENT OF THE CASE

On August 11, 1981, James C. Grandstaff, a camp cowboy for the North Camp, 6666 Ranch, was shot and killed on the premises of the 6666 Ranch, located approximately 1,000 feet south of a state highway (approximately 7 to 8 miles from Borger, Hutchinson County, Texas) at the terminus of a caliche road (Rec. 10, p. 223).

The Borger Police Officers at the scene of the shooting had reported to work at 11:00 o'clock p.m. on August 10, 1981 (Rec. 11, p. 388). Between 11:00 o'clock p.m., August 10, 1981, and approximately 4:00 o'clock a.m., August 11, 1981, Officers Roberts and Turner picked up a communication from Hutchinson County Deputy Morris concerning a possible kidnapping by a suspect named Lonnie Cox, and a possible warrant for the arrest of Lonnie Cox (Rec. 11, pp. 390-393).

Later, Officer Roberts observed a pickup truck meeting the description of the Lonnie Cox truck which had been broadcast over the Hutchinson County/City of Borger radio frequency (Rec. 11, p. 400). Officer Roberts began to follow the truck, and after observing the truck's movements, he turned on his red light with the intention of stopping the truck and making a positive identification and surveillance, but the suspect vehicle began to flee (Rec. 11, p. 410), and Officer Roberts began to pursue (Rec 11, p. 411). The suspect fired on the officers and the officers returned fire during the pursuit.

The pursuit continued along the state highway until the fleeing vehicle crossed a bar ditch, went through a fence, and entered a 6666 Ranch pasture, where it stopped (Rec. 11, pp. 434-435).

Borger Police Officers Alonzo, Ray, Davis, and Shultz either joined the pursuit or arrived at the caliche road shortly thereafter. One or more of the officers received fire from the area of the stopped pickup truck (Rec. 11, p. 448), and fire was returned by one or more of the officers (Rec. 11, p. 459).

The pickup that Officers Roberts and Turner had been pursuing then began to back up in a curving northeasterly direction (Rec. 11, p. 461) (Exhibit 9-B). One or more of the officers had seen a man exit from the truck and move in a westerly direction toward the point where shortly thereafter a second pickup truck began to proceed down the caliche road toward the line of Borger patrol cars parked on the caliche road (Rec. 11, pp. 447-477), and came to a stop (Rec. 11, p. 478). At this time the Borger officers began to shout and call over the PA system for the person to come out with his hands up (Rec. 11, p. 479), but no one exited, and the pickup backed south up the caliche road (Rec. 11, p. 485). The lights then went off on the pickup truck, and a light in the house came on for a brief instant (Rec. 11, pp. 485-487), at which point Officers Roberts and Alonzo moved to the east of the caliche road to check out the original pickup which had come to rest facing the west (Rec. 11, p. 487).

On arriving at the pickup, Officers Bailey and Alonzo confiscated a "Mini-14" rifle and several .223 rounds of ammunition (Rec. 11, p. 501).

Officers Bailey and Alonzo radioed the patrol cars on the caliche road that they were going to the house to check on the welfare of the occupants, and requested the officers to cut all lights on all vehicles to prevent silhouettes (Rec. 11, p. 505). Officers Roberts and Alonzo never reached the house, because the second pickup turned on its lights and again began approaching the line of police cars located on the caliche road (Rec. 11, p. 507).

The vehicle proceeded down the caliche road (Rec. 11, p. 507), and pulled up beside the first patrol car (Rec. 11, p. 509).

Instructions to "Be careful," "He's coming back," and other instructions were shouted by the officers, while simultaneously shouting, "Get out with your hands up, Borger Police Department, put your hands where we can see them." (Rec. 11, pp. 514-515).

A party got out of the driver's door of the pickup and started to the back of it; the figure then turned and started back towards the front of the pickup (Rec. 14, pp. 998-1002). A single shot was fired, followed by a volley of shots from several officers, including but not limited to the Borger Police Officers.

The party later identified as James C. Grandstaff did not comply with the officers' instructions to get his hands up and identify himself, but instead started making movements around his waist area like he was going for a pistol. The Borger Police Officers had been advised that the subject that they had been chasing was armed with a .45 pistol (Rec. 14, pp. 1004-1005). This later proved to be true.

Officer Ray, believing that he was in danger and in fear for his life, fired a Ruger Security Six .357 Magnum pistol at the silhouette (Rec. 13, p. 859, Rec. 14, pp. 1004-1008).

It is undisputed that James C. Grandstaff was not struck by a bullet fired from a Ruger Security Six .357 Magnum pistol (Rec. 20, p. 2312).

It was later established by autopsy that James C. Grandstaff died of a single wound by a bullet fired from a "Mini-14" rifle which was never identified.

The number of "Mini-14" carbines capable of firing the .223 Remington caliber slug at the scene of the shooting was never accurately established, but there was more than one at the scene and they were possessed by officers from governmental entities other than the Borger Police Department.

Mickey Dale Davis, a Borger Police Officer at the scene, was a veteran with ten years' military service and approximately seven and a half years in law enforcement. He held an Associate Degree in Criminal Justice, and he lacked twenty-one hours on a Bachelor's degree in Criminal Justice from Wayland Baptist University, Plainview, Texas. He held an intermediate Certificate of Law Enforcement issued by the Texas Law Enforcement Commission of Texas (Rec. 11, pp. 597-598).

He had extensive training in police enforcement, criminal investigation, constitutional law, crime investigation, and a background in law enforcement when employed by the City of Borger (Rec. 11, pp. 600-605).

John Wayne Turner, a Borger Police Officer, was present (Rec. 12, p. 670).

He had graduated from the Panhandle Regional Law Enforcement Academy (Rec. 12, p. 673), and was commencing his twelve-month employment requirement for basic certification (Rec. 12, pp. 676-677). He was given instruction in police work at the City of Borger, which was the same as he had been taught at the Panhandle Regional Academy (Rec. 12, p. 828).

Wayne Roy Shultz, a Borger Police Officer, was present. He had previous experience with other law enforcement agencies and had received an Associate Degree in Law Enforcement from Western Texas College, Snyder, Texas (Rec. 14, p. 1103). He was certified as a Texas Police Officer.

Bailey Hal Roberts, a Borger Police Officer, was present. He was a graduate of the Police Academy and a Certified Police Officer (Rec. 11, p. 405).

John Robert Alonzo, a Borger Police Officer, was present (Rec. 19, p. 2029). He was a Certified Police Officer (Rec. 19, p. 2068).

The City of Borger conducted investigations into the background of all of the officers and other persons applying for the position of officer at the City of Borger (Rec. 21, p. 2488).

Applicants for a police officer position with the City of Borger must have either a high school education or twelve (12) semester hours of college, and hold a basic certification as a police officer, or attain that certification within a period of twelve (12) months (Rec. 21, p. 2490).

Applicants for employment by the police department were psychologically evaluated by a health officer (Rec. 21, p. 2498).

The City of Borger had a prepared written City of Borger Employee Manual (Rec. 21, p. 2519, Defendant's Exhibit 88), which contained provisions for incentive pay for the Borger police officers to obtain additional education after they have been employed by the City of Borger.

There was no evidence of prior misconduct within the Borger Police Force or of prior knowledge and state of mind of the Police Chief and no evidence of a "policy" or "custom" authorizing or condoning action of the officers (Opinion, *Grandstaff v. Borger,* 767 F.2d 161 at p. 171 (5th Cir. 1985)).

———o———

ARGUMENT

Municipal Liability

The Fifth Circuit Court of Appeals held in *Grandstaff v. City of Borger, Texas, et al, supra,* that an unconstitutional policy or practice sufficient to impose liability upon a municipality pursuant to 42 U.S.C. § 1983 can be inferred from the conduct of the policymaker subsequent to a single isolated incident.

It thus established a new criteria for municipal 42 U.S.C. § 1983 liability, thereby creating confusion and conflict in the law which is evidenced by its own opinion and by subsequent federal opinions.

The jury found that the City of Borger was grossly negligent in failing to properly train its police officers,

and that there was serious incompetence or misbehavior, general or widespread, throughout the City police force. These findings were challenged because there was no evidence to support such findings.

The court agreed that there was no legally competent direct evidence to support such findings, and in order to affirm the trial court's judgment the court created dual inferences supported only by what the court deemed to be a failure of the defendant policymaker to take appropriate action following the single isolated incident in question.

The Fifth Circuit commenced its discussion of municipal liability by stating well established rules of law governing a municipality's 42 U.S.C. § 1983 liability:

> There is no respondeat superior liability of a municipality for the negligence, gross or ordinary, of an officer. There must be (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of constitutional right. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (en banc), *cert. denied*, — U.S. —, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *Webster v. City of Houston*, 735 F.2d 838 (5th Cir.) (en banc), *rev'd on other grounds*, 739 F.2d 993 (5th Cir. 1984) (en banc). 767 F.2d 161 at p. 169.

Having stated this principle of law, the court then proceeded to review the evidence to support the existence of a *policy* which *was the moving force* of the plaintiffs' constitutional deprivation.

The Court found no direct evidence.

> [17] (d) There was no direct testimony of prior misconduct within the Borger police force or of prior

> knowledge and state of mind of the police chief. We know from *Tuttle v. Oklahoma City,* — U.S. —, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). that isolated instances of police misbehavior are inadequate to prove the knowledge and acquiescence by a city policymaker in that manner of conduct. That is not our case, however. 767 F.2d 161 at p. 171.

The total absence of such evidence led the court into formulating its own new and innovative standard for liability.

> The disposition of the policymaker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made. 767 F.2d 161 at p. 171.

The Court thus established that not only can a *policy* be inferred from the conduct of the policymaker following a single isolated incident, but also that it can be ***inferred*** that such subsequent conduct was "the moving force of the Constitutional violation" as required by *Polk Co. v. Dodson,* 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

The Court erred on both the law and the facts.

As to the facts, the record will demonstrate that contrary to the Court's assumption, the Chief of Police, Borger, Texas, shortly after the incident in question, recog-

nized that an investigation had to be accomplished, and could best be accomplished impartially by an independent agency. He therefore immediately requested that the Texas Rangers, a force of the Department of Public Safety, State of Texas, and the District Attorney's investigator of the county in which the incident occurred (different from the county in which the City of Borger, Texas is situated) make a full and complete investigation. This was accomplished. No recommendations for disciplinary action were made and none was taken (Rec. 17, pp. 1872, 1875, 1876; Rec. 21, p. 2521).

As to the law, the dissent of Justice Garwood states the matter as succinctly as possible.

> However, the majority goes on to hold that the existence of such policy level "instruction or example of acceptance" can be inferred here because after the event there was "no sign of any concern except that the city avoid liability." As a logical, factual matter this is simply too big a leap, given the absence of evidence of any prior actual or claimed reckless action by Borger police or of any prior conduct by Borger officials which could fairly be considered an authorization, approval or condonation of police recklessness. Surely a police chief's *unexpressed* "preexisting disposition" is not a *city* "policy" within the majority's, or any other reasonable, definition. There is no evidence of any prior expression of the inferred "preexisting disposition." We are seeing cloud castles. A "policy" has been created out of thin air. What we are really doing is punishing the City, not for wrongfully or unconstitutionally bringing about this tragedy, but for its post-event callousness. That is not actionable under section 1983, and even if it were, none of the kind of damages awarded here would be recoverable for it. 767 F.2d 161 at p. 173.

The opinion of the Court is not only erroneous and in conflict with other courts, but it also creates confusion in the law.

Two of the circuit judges concurring in denial of the petition for rehearing and suggestion for rehearing en banc stated:

> We are also persuaded that reconsideration of this case en banc will generate more confusion and uncertainty than has the panel opinion. (App. 35)

Subsequent to the Grandstaff decision we have *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), which while affirming liability against the municipality, in fact rejected the reasoning of *Grandstaff v. City of Borger.*

> 7. We agree with appellant that the district court's stated reason for denying the motion for judgment notwithstanding the verdict also reflects an insufficient basis for imposing municipal liability. The court suggested that the City had ratified defendant Perry's action by clearing him and finding that he had acted in accordance with the police department's policies. We are unconvinced that a failure to discipline Perry or other officers amounts to the sort of ratification from which a jury properly could infer municipal policy. Cf. *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985). 777 F.2d 801 at p. 809.

In *Mariani v. City of Pittsburgh, et al*, 624 F.Supp. 506 (W.D.Pa. 1986), the trial court in granting summary judgment for the municipality charged with a 42 U.S.C. § 1983 Constitutional deprivation stated:

> Allowing an inference that, because neither officer received discipline as a result of his only prior com-

> plaint, the City has tacitly authorized the use of excessive force would be absurd. (p. 506)

The Court in *Grandstaff v. Borger, supra,* not only allowed such inference, but allowed it based not on prior complaints of which the policymaker had knowledge, but on an alleged failure to take action following the very incident giving rise to the complaint.

Petitioners cannot help but agree that this is an absurdity.

Five circuit judges, including the Chief Judge of the Fifth Circuit, dissented in a written opinion on petition for rehearing and suggestion for rehearing en banc. The opinion in dissent authored by Justice Robert M. Hill so clearly states the position of the petitioners that it would be redundant to attempt to advance further reasons for the writ of certiorari.

The following language, however, must be accentuated:

> The majority opinion in this case by holding that the City of Borger is liable to the plaintiffs because of a city policy derived from (1) the conduct of the police officers during the incident giving rise to this case, and (2) the conduct of city officials in failing to reprimand, discharge and admit errors of its police force has deviated egregiously from the Supreme Court's and our circuit's holdings as to the requirements for a municipality's liability under § 1983. (App. 35)

Aside from the truth of the statement, it is important because it demonstrates that the court did not find that the jury had sufficient evidence to find either gross negligence in the training of the Borger police officers, or serious incompetence or misbehavior, widespread or general, throughout the police force, but instead found that in the

absence of such evidence, the municipality was liable under 42 U.S.C. § 1983 because of the conduct of the police officers during the incident, and the conduct of the policymaker following the incident.

> In reaching this holding, the majority, like the jury, was unable to rely on evidence of a prior pattern of similar misconduct of the police force resulting in injury to citizens or on the evidence of serious incompetence or misbehavior throughout the police force. In order to make up for this deficiency in the evidence, the majority resorted to what it describes as the repeated acts of abuse of the police officers on the evening in question and also the failure of city officials to take disciplinary action against the offending officers after the incident.[3]

In light of our holdings in *Languirand, Bennett,* and *Webster,* and the Supreme Court's recent decision in *Tuttle,* the facts of this case do not give rise to liability on the part of the city. No fanciful structuring of the conduct of these officers on the evening in question can suffice as evidence of conduct that is "permitted and well settled," "persistent and widespread," a "systematic maladministration" or "deeply embedded traditional ways" — the type of conduct required under the case law to prove a "policy." The "isolated" event, *i.e.*, the incident in question, on which this case is founded is simply not enough. The following language from *Webster* bears out the requirement of a persistency of conduct before a policy can be found:

---

[3] The majority also opted for a definition which permits a finding of a policy when the evidence supports merely a "disposition" to effect a cause of action by a policy maker. This is a less stringent definition than that referred to by the Supreme Court in *Tuttle:* "One well-known dictionary, for example, defines 'policy' as a 'definite course or method of action selected from among alternates and in light of given conditions to guide and determine present and future decisions.' Webster's Ninth Collegiate Dictionary 910 (1983)." — U.S. at — n. 6, 85 L.Ed.2d at 804 n.6.

> If actions of city employees are to be used to prove a custom for which the municipality is liable, those actions *must* have occurred for *so long or so frequently* that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the *expected, accepted practice of city employees.*

738 F.2d at 842(emphasis added). If the questioned conduct of a city employee alone be deemed sufficient to infer a policy, then our previous requirements in this area are negated.

Nor is it any aid to the majority's holding that the city failed to later discipline the officers for their conduct on this occasion. The post-event failure to discipline the officers (call it as the majority does callous in nature if one must) cannot supply the necessary linkage to establish a city policy. An after-the-fact failure to discipline illegal conduct is by itself no evidence of a before-the-fact policy of illegal conduct. It might be evidence of a policy commencing from that point in time when no discipline was invoked, but certainly not before. We so held in *Berry v. McLemore,* 670 F.2d 30 (5th Cir. 1982), where a police chief committed an aggravated assault on a person he was attempting to issue a traffic citation. We stated that a municipal policy of authorizing policy misconduct "cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality." 670 F.2d at 33 (citing *Landigran v. City of Warwick,* 628 F.2d 736 (1st Cir. 1980), and *Turpin v. Mailet,* 619 F.2d 196 (2nd Cir.), *cert. denied,* 449 U.S. 1016 (1980)).[4]

---

[4] In *Berry* the court found no inference of a city policy was possible when an independent investigation of the questioned event had taken place and the city followed the recommendation of the investigator in not invoking discipline against the chief of police. In *Grandstaff* there is also a suggestion in the evidence that the Texas Rangers were called on to make an investigation of the conduct of the officers on the occasion in question, but there is no indication what these recommendations might have been. (App. 43)

In doing so, the Fifth Circuit departed from its own definitions, stated as recently as 1984, in *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984) (en banc) (per curiam), rev'd on other grounds, 739 F.2d 993 (5th Cir. 1984) (en banc), when it stated:

> A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy. Official policy is:
>
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. *A persistent, widespread practice* of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is *so common and well settled as to constitute a custom that fairly represents municipal policy.* Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.
>
> 735 F.2d at 841 (emphasis added).

The Court also deviated from its own holding in *Languirand v. Hayden*, 717 F.2d 220 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 2656 (1984), the very case upon which counsel and the trial court relied in submitting the case to the jury.

> Our holdings in *Bennett* and *Webster* that proof of prior incidents of misconduct was an essential element to the establishment of the liability of a city through a policy based on custom were foreshadowed

by our earlier holding in *Languirand v. Hayden*, 717 F.2d 220 (1983), *cert denied*, — U.S. —, 104 S.Ct. 2656 (1984). In *Languirand* we discussed the proof required to hold a city liable under § 1983 when the basis for doing so is the failure to train its police force. We stated:

> We conclude that if there is a cause of action under section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, *in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.*

717 F.2d at 227-28 (emphasis added). (App. 38)

The Fifth Circuit Court of Appeals has rendered a decision in conflict with the decisions of the U.S. Supreme Court and other federal courts of appeals on the same issues, and has created confusion in the law.

In addition, this Court has branded the lawful efforts of an entire city and its police force to prove their innocence as "unworthy, if not despicable," as well as "callous."

There is no justification for these statements. There is no justification for "ad hoc" liability based on one justice's perception of the nature of the parties involved.

LIABILITY OF THE DEFENDANT BORGER POLICE OFFICERS

In response to special issues, the jury found that the Defendant Borger Police Officers arrested James C. Grandstaff (S. I. No. 1(a)) (Appendix at 58); that the Defendant Borger Police Officers *had probable cause* to arrest James C. Grandstaff without a warrant (S. I. No. 1(b)) (Appendix at 60); that the Defendant Borger Police Officers used deadly force against James C. Grandstaff (S. I. No. 2(a)) (Appendix at 63); and that the Defendant Borger Police Officers were *justified* under the laws of the State of Texas when they used deadly force against James C. Grandstaff (S. I. No. 2(c)) (Appendix at 64).

These jury findings establish as a matter of law that the Defendant Borger Police Officers did not deprive James C. Grandstaff of life without due process.

In response to further special issues, the jury found that the Defendant Borger Police Officers' use of deadly force against James C. Grandstaff was reckless (S. I. No. 2(d)) (Appendix at 65).

In connection with Special Issue No. 2(d) the Court charged the jury:

> Even if a police officer was justified under the laws of the State of Texas when he used deadly force against James C. Grandstaff, that justification is unavailable as a defense in this lawsuit if his use of deadly force recklessly killed an innocent third person.

(Appendix at 65).

The trial court adopted this instruction from the Texas Penal Code § 9.05, Vernon's Texas Codes Annotated:

> Even though an actor is justified under this chapter in threatening or using force or deadly force against another, if in doing so he also recklessly injures or kills an innocent third person, the justification afforded by this chapter (Chapter 9, Justification Excluding Criminal Responsibility) is unavailable in a prosecution for the reckless injury or killing of an innocent third person.

This is consistent with Texas tort law. *Helms v. Harris,* 281 S.W.2d 770 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.). If an issue had been submitted and answered favorably to Plaintiffs' finding that such recklessness created an unreasonable risk of harm to James C. Grandstaff, recovery under *state law* for some amount of damages on behalf of some of the Plaintiffs would have been permissible under state law. This finding, however, does not constitute a finding of deprivation of life without due process and is an issue that should have been litigated in the state courts, or if judgment was to be rendered, it should have been rendered in accordance with state law and not Title 42, § 1983.

The jury further found that the Defendant Borger Police Officers' use of deadly force against James C. Grandstaff was maliciously, wantonly, or oppressively done (S. I. No. 2(g)) (Appendix at 66), and that the Borger Police Officers *did not use more* force than was reasonably necessary to effect and maintain the detention of James C. Grandstaff (S. I. No. 5(a)) (Appendix at 68).

The Court of Appeals upheld liability against the Defendant Borger Police Officers on both the federal and state claims.

The Court of Appeals nullified the findings of the jury that the Defendant Borger Police Officers had *probable cause* to arrest the deceased, James C. Grandstaff; that they were *justified* in using deadly force, and that they used no more force than was reasonably necessary to effect and maintain the detention of James C. Grandstaff:

> There was a preliminary finding that the officers were justified in using deadly force against one believed to be Lonnie Cox, but that finding was nullified by the succeeding finding to the effect that the officers were not justified in *this* use of deadly force because, under all the circumstances, they acted recklessly. Without justification for their conduct, their use of deadly force was wrongful and it was found to be, as it would necessarily be, the proximate cause of the death of James Grandstaff. 767 F.2d 161 at p. 168.

The Court of Appeals has thus held that even though an arrest is with probable cause, and use of deadly force is justified, and no more force is used than is reasonably necessary to effect and maintain the detention of the suspect, nevertheless, because an innocent third person dies, and because the officers acted recklessly and maliciously or wantonly or oppressively, such deprivation of life is without due process of law.

To paraphrase, if an officer arrests with probable cause, and is justified in the use of deadly force, and uses no more force than is reasonably necessary to effect and maintain the detention of the suspect, nevertheless this constitutionally authorized arrest and use of force can be translated into a deprivation of life without due process in violation of the United States Constitution because of the *officer's state of mind.* This is contrary to existing law.

Terket v. Lund, 623 F.2d 29 (7th Cir. 1980).

> If the defendants had probable cause to believe that Terket was guilty of disorderly conduct, their allegedly malicious motives are immaterial (citations omitted). 623 F.2d 29 at p. 31.

Hunter v. Clardy, 558 F.2d 290 (5th Cir. 1977).

> Once probable cause is established, the arresting officer's collateral bad motive is immaterial since the guilt of the arrestee is determined by a judicial officer, not by the law enforcement officer.[1] There is no indication but that the arresting officer believed plaintiff Hunter to have committed the offense with which she was charged. 558 F.2d 290 at p. 292.

[1] The converse is not true—where there is not probable cause to arrest, good faith or bad faith in arrest is relevant in a Section 1983 suit. This inquiry goes to the question of whether the officer believed that the arrestee had committed an offense. If he so believed in good faith, he enjoys a qualified immunity from § 1983 liability.

558 F.2d 290 at p. 292.

This Honorable Court's opinion in *Tennessee v. Garner*, 471 U.S. —, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985), cited by the Fifth Circuit does not deter from this argument.

In *Tennessee v. Garner* this Honorable Court held:

> This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

The trial court charged the Grandstaff jury:

'Deadly force' means force that is intended or known by the peace officer to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ.

You are instructed that under the laws of the State of Texas, as set forth in the Penal Code, a peace officer is justified in using deadly force against a person when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, if:

(1) the peace officer reasonably believes that the arrest is lawful; and

(2) before using deadly force, the peace officer manifests his purpose to arrest and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested; *and either*

(3a) the peace officer reasonably believes that the conduct for which arrest is authorized included the use or attempted use of deadly force; *or*

(3b) the peace officer reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the peace officer or another if the arrest is delayed.

A peace officer is under no duty to retreat before using deadly force.

'Reasonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the peace officer.

(Appendix at p. 63).

The jury, responding to this charge, found that the Defendant Borger Police Officers' use of deadly force was justified under the laws of the State of Texas.

If the laws of the State of Texas from which the trial court drew its charge are constitutional, then the Defendant Borger Police Officers acted within constitutional limits. If they are not constitutional, then the burden rested with Plaintiffs to obtain a finding which would strip the Defendant Borger Police Officers of their right of qualified immunity. *Saldana v. Garza,* 684 F.2d 1159 (5th Cir. 1982), and *see Davis v. Scherer,* 468 U.S. —, 104 S.Ct. —, 82 L.Ed.2d 139 (1984); *Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Garris v. Rowland,* 678 F.2d 1264 (5th Cir. 1982).

The opinion of the Court of Appeals on the officers' liability is contrary to the pronouncements of this Honorable Court, other federal courts, and its own opinions, and is contrary to the purposes and thrusts of 42 U.S.C. § 1983.

For example, in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), at 413 the court says:

> In the leading case of *Screws v. United States,* 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 A.L.R. 1330 (1945), the Court considered the proper application of the criminal counterpart of § 1983, likewise intended by Congress to enforce the guarantees of the Fourteenth Amendment. In his opinion for the Court plurality in that case, Mr. Justice Douglas observed:
>
> > 'Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even mur-

> dered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.' 325 U.S., at 108-109, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 A.L.R. 1330.

This principle is repeated in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), at 434:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

This principle has been recognized by the Fifth Circuit in *Cook v. Houston Post*, 616 F.2d 791, at 794 (5th Cir. 1980):

> The Fourteenth Amendment does not protect against all deprivations of liberty or property. It protects only against deprivations of liberty accomplished without due process of law. The Due Process Clause does not ex proprio vigore extend to a person a right to be free of injury merely because the state is characterized as the tortfeasor. The Constitution does not guarantee that only the guilty will be indicted and

arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed for every suspect arrested. *Baker v. McCollan,* 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). Plaintiffs were indicted by a grand jury and acquitted by a petit jury.

Neubauer v. City of McAllen, Texas, 766 F.2d 1567 (5th Cir. 1985).

JOINT AND SEVERAL LIABILITY

S. I. No. 7(d) (Appendix at 74), as answered by the jury, apportioned the percentage of fault attributable to each defendant for the death of James C. Grandstaff.

It was undisputed that Defendant Borger Police Officers Turner, Roberts, and Ray did not fire the fatal shot. Defendant Borger Police Officer Alonzo could have, but no determination of this fact was sought or made.

The Fifth Circuit Court of Appeals decreed joint and several liability for the full amount of damages awarded.

In doing so, the Court refused to follow its own well-reasoned opinion in *Dobson v. Camden,* 705 F.2d 759 (5th Cir. 1983), *rehearing granted en banc,* 709 F.2d 7 (5th Cir. 1983), *affirmed,* 725 F.2d 1003 (5th Cir. 1984).

The holding of the Court of Appeals in this case violates the rules laid down by the foregoing authorities. It also violates principles of federal jurisdiction, which must be corrected to prevent the destruction of our federal judicial system.

For those reasons we submit that the case is of such importance that it deserves the attention of the Supreme Court.

CONCLUSION

Because the Fifth Circuit Court of Appeals has rendered an opinion that is contrary to the holdings of the Supreme Court of the United States, of other federal courts, and of its own previous opinions upon which the Bench and Bar must rely, it is respectfully urged that this Honorable Court issue a Writ of Certiorari to the Fifth Circuit Court of Appeals to review its judgment and eliminate those uncertainties which the opinion of the Fifth Circuit Court of Appeals creates.

Respectfully submitted,

WAYNE P. STURDIVANT
GIBSON, OCHSNER & ADKINS
500 First National Bank Building
Amarillo, TX 79101
(806) 378-9714

Attorney for Petitioners

APPENDIX

Sharon GRANDSTAFF, Individually and As Representative of the Estate of James C. Grandstaff; and Kay LaJune Grandstaff, As Next Friend of Jo Cheryl Grandstaff, A Minor, et al., Plaintiffs-Appellees, Cross-Appellants,

v.

The CITY OF BORGER, TEXAS, et al., Defendants-Appellants, Cross-Appellees.

Sharon GRANDSTAFF, Individually and As Representative of the Estate of James C. Grandstaff, et al., Plaintiffs-Appellees,

v.

The CITY OF BORGER, TEXAS, et al., Defendants-Appellants.

Nos. 84-1241, 84-1337.

United States Court of Appeals, Fifth Circuit.

Aug. 5, 1985.

Action was brought against city and its police officers under Texas law and § 1983 after officers mistook innocent victim for a fugitive and killed him. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., entered judgment in favor of estate and family of victim, and city and officers appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) officers were liable under Texas law and § 1983 for death of victim caused by reckless use of deadly force; (2) city enjoyed governmental immunity from state tort claim for wrongful death; (3) city was liable under § 1983 for policy attributable to city police chief that was cause of victim's death; (4) victim's father was entitled to award of $200,000 in damages for loss of society and companionship and for mental anguish due to death of victim;

(5) victim's widow and stepsons, as bystanders, were entitled to recover damages from officers under Texas law for negligent infliction of emotional distress; but (6) widow and stepsons could not recover damages from city under § 1983 for negligent infliction of emotional distress.

Affirmed in part; modified in part, and remanded.

Garwood, Circuit Judge, filed opinion dissenting in part.

1. Municipal Corporations 747(3)

Even if police officers would have been justified under Texas law in using appropriate deadly force against fugitive, there could be no justification, where innocent third person was recklessly killed. V.T.C.A., Penal Code § 9.05.

2. Constitutional Law 255(2)

Fourteenth Amendment protection against deprivation of life without due process of law is violated when police officers using deadly force, in conscious disregard of substantial risk of harm to innocent parties, kill an innocent third party. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

3. Civil Rights 13.13(3)

In § 1983 action against police officers who mistook innocent victim for fugitive and killed him, evidence that officers knew that third parties lived in home from which victim's pickup had come, that they were aware of possibility that innocent resident of house could have been in pickup, and that officers, from their protected position in path of pickup, with five patrol units and six officers between slow-moving pickup and exit, without awaiting any

hostile act or sound, poured gunfire at pickup and into person of victim, established that officers consciously disregarded substantial risk to innocent persons and that their use of deadly force was maliciously, wantonly, or oppressively done, so that officers deprived victim of life without due process of law. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

4. Civil Rights 13.4(2)

Fact that there was no evidence or finding of fact that a particular police officer fired shot that actually struck and killed innocent victim did not release any police officer from liability for having deprived victim of life without due process of law, where fire storm that killed victim was in all respects a joint operation involving the same recklessness, same circumstances and same object on part of each participating police officer. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

5. Civil Rights 13.7

Joint and several judgment was properly entered against city police officers, who acted in concert in disregarding a substantial risk to innocent persons and maliciously, wantonly, and oppressly used deadly force to deprive innocent victim of his life without due process of law by mistaking victim for fugitive and killing him. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

6. Civil Rights 13.13(1)

Reckless use of deadly force by city police officers was not within their discretionary authority, and wanton and oppressive taking of life of innocent victim violated clearly established law, so that estate and family of inno-

cent victim, in § 1983 action against officers, did not have to bear burden of proving that officers, who pleaded a defense of qualified immunity, were not acting in good faith in the performance of a discretionary duty. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

7. Civil Rights 13.4(2)

Without justification for their conduct, city police officers' use of deadly force against innocent victim mistaken for a fugitive and killed by officers was wrongful and, thus, was the proximate cause of the death of victim and the resulting damages sustained by the estate and family of victim. 42 U.S.C.A. § 1983.

8. Municipal Corporations 747(3)

Under Texas law, city enjoyed governmental immunity from state tort claim involving wrongful death of innocent victim who was mistaken by city police officers for a fugitive and killed.

9. Civil Rights 13.7

Under § 1983, there is no respondeat superior liability of a municipality for the negligence, gross or ordinary, of a city police officer. 42 U.S.C.A. § 1983.

10. Civil Rights 13.7

For a city to be liable under 42 U.S.C.A. § 1983, there must be: a policy; of the city's policymaker; that caused; plaintiff to be subjected to the deprivation of constitutional right.

11. Civil Rights 13.7

An "inadequate" training program for police officers alone is not ordinarily the moving force behind an in-

jured plaintiff's harm and, thus, is not ordinarily sufficient to impose liability upon a city under 42 U.S.C.A. § 1983, since the police officer who injures plaintiff does not rely upon inadequate training as tacit approval of his conduct.

12. Civil Rights 13.7

To impose liability upon a city under 42 U.S.C.A. § 1983, it is not enough that city could, but did not, reduce risk of harm to plaintiff, nor is it sufficient to prove that a supervisor has failed to satisfy a general responsibility to supervise employees imposed by state law.

13. Civil Rights 13.7

If there is reckless disregard for human life and safety prevalent among city's police officers which threatens life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by city policymaker, policy itself is a repudiation of constitutional rights and is sufficient to render city liable under 42 U.S.C.A. § 1983.

14. Civil Rights 13.7

Where police officers know at time they act that their use of deadly force in conscious disregard of rights and safety of innocent third parties will meet with approval of city policymakers, affirmative link between occurrence of various incidents of police misconduct and adoption of plan or policy showing authorization or approval of such misconduct by city is satisfied, and city is liable to third parties under 42 U.S.C.A. § 1983.

15. Civil Rights 13.7

Where city policymaker knows or should know that city's police officers are likely to shoot to kill without justification and without restraint, so as to endanger innocent third parties, city is liable under 42 U.S.C.A. § 1983 when the inevitable occurs and the officers do so.

16. Federal Civil Procedure 2197

Jury verdict must be construed in the context of the evidence and the issues raised by the parties before the jury.

17. Civil Rights 13.13(3)

Isolated instances of police misbehavior are inadequate to prove knowledge and acquiescence by a city policymaker in that manner of conduct sufficient to render city liable under 42 U.S.C.A. § 1983.

18. Civil Rights 13.13(3)

For purposes of establishing liability of city under 42 U.S.C.A. § 1983, prior incidents of abusive police conduct tend to prove pattern or custom and accession to that custom by city policymaker.

19. Civil Rights 13.13(3)

In § 1983 action against city for death of innocent victim killed by city police officers who mistook him for a fugitive, evidence that city police officers repeatedly engaged in reckless acts with deadly weapons on night in question in pursuit of fugitive, and that city police chief took no steps to correct conduct of officers as to use of deadly force after night in question, established policy of

reckless disregard for human life and safety prevalent among officers attributable to city police chief that was cause of victim's death. 42 U.S.C.A. § 1983.

20. Civil Rights 13.13(3)

Subsequent conduct may prove discriminatory motive in a prior employment decision.

21. Conspiracy 19

Subsequent acts may tend to prove nature of a prior conspiracy.

22. Civil Rights 13.13(3)

For purposes of establishing liability of a city under 42 U.S.C.A. § 1983, subsequent acceptance of dangerous recklessness by city policymaker tends to prove policymaker's preexisting disposition and policy.

23. Federal Courts 415

In § 1983 action, state law governed damages recoverable for death of innocent victim, whom city police officers killed after they mistook him for a fugitive. 42 U.S.C.A. § 1983.

24. Death 88, 89

Under Texas law, parent may recover for loss of society and companionship and for mental anguish caused by death of child, whether or not there is any pecuniary loss.

25. Death 88, 89

In action under Texas law by a parent to recover for loss of society and companionship and for mental anguish caused by death of child, no distinction is made whether

deceased be a minor or adult child; declining to follow *Piper Aircraft Corp. v. Yowell*, 674 S.W.2d 447.

26. Damages 50

To recover for mental anguish under Texas law, there need be no physical manifestation proved.

27. Death 95(1)

In § 1983 action brought against city and its police officers for death of innocent victim killed by officers after they mistook him for a fugitive, evidence that victim was his father's only child, that relationship between father and victim was a close one and that father's very life was destroyed by victim's death, supported award of $200,000 in favor of victim's father for loss of society and companionship and for mental anguish caused by death of victim. 42 U.S.C.A. § 1983.

28. Damages 51

Under Texas law, victim's widow could recover damages from city police officers for injuries sustained as bystander when she witnessed lethal gunfire directed by officers at pickup truck driven by victim, whom officers mistook for a fugitive.

29. Damages 51

To recover for tort of negligent infliction of emotional distress to a bystander, Texas law requires that bystander be closely related to victim and that bystander suffer emotional trauma as result of contemporaneous perception of event from nearby location.

30. Damages 51

Two stepsons who were minors living with victim stood in close relationship required by Texas law to permit their recovery of damages, as bystanders, for negligent infliction of emotional distress, where stepsons witnessed lethal gunfire directed at pickup truck driven by victim, whom city police officers mistook for a fugitive.

31. Civil Rights 13.4(1)

Negligent infliction of emotional distress is a state common-law tort; there is no constitutional right to be free from such distress and, thus, no liability for such distress under 42 U.S.C.A. § 1983.

32. Civil Rights 13.4(2)

Widow and stepsons of innocent victim killed by police officers after they mistook him for fugitive could not recover damages from city under 42 U.S.C.A. § 1983 for negligent infliction of emotional distress.

Gibson, Ochsner & Adkins, Wayne P. Sturdivant Amarillo, Tex., Gassaway, Gurley, Sheets & Mitchell, Jody Sheets, Borger, Tex., for City of Borger, Tex., et al.

Haynes & Fullenweider, Clinard J. Hanby, Robert B. Wallis, Houston, Tex., for Grandstaff, et al.

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

REAVLEY, Circuit Judge:

The City of Borger police mistook James C. Grandstaff for a fugitive and killed him. The estate and family of Grandstaff sued and recovered $1,430,000, together with attorneys' fees and expenses, from four of the officers as well as the City. We uphold the liability of the officers on both the federal and state claims and the damages award because of Texas law; we sustain the 42 U.S.C. § 1983 liability of the City but modify the damages recovered against it.

I. The Events of August 11, 1981

Shortly after 4:00 a.m. two Borger policemen signaled the driver of a pickup truck to stop because, according to them, they saw the vehicle veer across the street's center stripe and they identified it as one thought to be driven by Lonnie Cox. Cox was not known to the officers, but they had received reports that day of his involvement in some difficulty and they expected notification of a warrant that would justify his arrest. Cox was actually the one driving the pickup and had no passenger with him, although the officers could not have then known this to be so. When Cox refused to stop, three police patrol cars gave chase at high speeds, and gunfire erupted. No bullet struck the police cars, but many did strike the Cox vehicle and Cox was wounded. About seven miles east of Borger, Cox suddenly turned from the highway and went through a fence onto the 6666 Ranch. He drove south into the ranch and then turned to the east. The police officers came to an entrance into the ranch and drove across the cattle guard and on a caliche road for a distance of about 100 yards. The first three police units were quickly joined by two more.

The Cox vehicle had crossed the caliche road and stopped some 75 yards to the east near a cross fence. Down the caliche road about 200 yards further stood a house, although the officers said that they could not see it at the time of their arrival in the rainy darkness. When Cox left his pickup, there was more gunfire. Again, no bullets struck the police cars, but one police bullet did strike the ranch house.

In the house James C. Grandstaff and his family were awakened by the noise. James Grandstaff was the 31 year old foreman in charge of the north portion of this large ranch. His family included his wife, Lois Sharon Grandstaff, his minor daughter, Jo Cheryl Grandstaff, and two stepsons, Randy Glen and Charles Robert Gatlin. Grandstaff went to the window, saw the flashing lights of the police cars, and heard commands being shouted over a loudspeaker. He quickly dressed and drove his own pickup down the caliche road to investigate the problem, no doubt thinking himself safe in the presence of so many law enforcement people. After he reached the police cars, saw the Cox pickup to the east and heard the call on the police loudspeaker for the one addressed being ordered to come out with his hands up, James Grandstaff drove back to his house to warn his family that the police were after someone who could possibly reach the area of the home. He left a gun with his oldest stepson, told him to lock the doors and let no one in the house, and then returned in his pickup to assist the police officers. As his pickup reached the patrol cars the second time, officers opened fire upon him from two sides. He managed to get out of his pickup but was shot in the back with a high

powered rifle. Grandstaff was dead before he could be taken to a hospital. An hour later the wounded Lonnie Cox surrendered at the highway, after having hidden in an outbuilding near the Grandstaff home.

The dispatcher at Borger police headquarters made the following entries on her police radio log:

Time	Nature of Transaction
4:23	[3 units in pursuit] Chief advised subject firing
4:29	Left pickup in pasture . . . firing on them
4:33	Car coming out from house. Don't know if it will be people
4:35	Vehicle backing up going back to house
4:40	Light just came on inside house. Light now gone off
4:43	At present everything quiet. Vehicle leave house again
4:47	Firing, man down, send ambulance

At the time of the firing there were five police cars in a line on the caliche road manned by six Borger policemen, composing the entire night shift of the force. All of the officers were heavily armed.

The plaintiffs sued four of the officers and the City seeking damages for a civil rights violation under § 1983 as well as for state tort claims. After a two week trial, the jury found that the four officers were reckless in their gunfire, consciously disregarding a substantial and unjustifiable risk and that the use of that deadly force was maliciously, wantonly, or oppressively done. The jury further found that the City of Borger was grossly negli-

gent in failing to properly train its police officers and that there was serious incompetence or misbehavior general or widespread throughout the City police force. The following damages were awarded:

1. To the estate $100,000 for the pain and suffering of James Grandstaff prior to his death.
2. To the widow, Lois Sharon Grandstaff, $250,000 for her pecuniary loss and $250,000 for her loss of society and mental anguish.
3. To the minor daughter, Jo Cheryl Grandstaff, $200,000 for her pecuniary loss and $250,000 for her loss of society and mental anguish.
4. To the father, Joe H. Grandstaff, $200,000 for his loss of society and companionship and for his mental anguish.
5. To Lois Sharon Grandstaff $100,000, to Randy Gatlin $25,000 and to Robert Gatlin $25,000, for their emotional injury sustained as the result of seeing the circumstances surrounding the shooting and death of James Grandstaff.
6. Punitive damages were awarded against the four officers—$3000 to Lois Sharon Grandstaff against each, $3000 to Jo Cheryl against each, and $1500 to Joe Henry Grandstaff against each.

Peace officers stand at the front of law and the ordering processes of society. They restrain the violator, protect the compliant, and represent constituted authority in the scenes of both peace and turbulence of community life. We depend heavily upon their skill and disposition. They deserve and require the understanding and support of judges as well as of all citizens. Where any officer fails—whether for lack of courage, judgment, integrity, or humaneness—all the community suffers. We suffer because

vested authority has failed to prevent some harm or because authority has been sullied and abused. With any abuse of authority the entire ordering process is weakened. The public trusts the entire process less, and antagonism to all figures of authority rises. No one should be more alert to the cost of failure than responsible law enforcement officers and we who work in the courts. We must do what we can to avoid the failures, to prevent their reoccurrence, and—at all times—stay true to the requisites of honesty and accountability imposed upon all who are at once representative of the law and subject to it.

Our reading of this long trial record reveals how officers and a city police force failed, at great cost, and how those officers and their supervisors thereafter denied their failures and concerned themselves only with unworthy, if not despicable, means to avoid legal liability. The City and officers insist, to this day, that they are free of fault and deserve no blame. They display no sense of obligation other than to this joint disclaimer and defense. There is not a single word in this record about any effort at any time by the City of Borger to avoid police failure or abuse. The officers, called to the witness stand by the plaintiffs, were evasive and forgetful and self-contradictory. The scene at the 6666 Ranch that dark night in 1981 was distressing; succeeding events, the scene of this trial, and the posture of the defense only exacerbate the distress.[1]

---

1. Officer Ray testified that Cox fired from his pickup in the pasture, but Ray told the chief of police on the morning after the event that he was not sure he received any gunfire at that time. Ray testified that after the Grandstaff pickup came down

(Continued on following page)

II. Liability of The Police Officers

[1, 2] The officers are liable under Texas law for the wrongful death of James Grandstaff. Even if the officers

---

(Continued from previous page)

the road the second time, from the front of the headlights he saw through the drizzle the silhouette of a person getting out of the pickup. He said he shot at the silhouette because "the individual started making movements around his waist area, like he . . . an individual would make going for a gun." Though he was still a Borger police officer at the time of the trial, Ray testified that his conduct on this occasion had never been criticized.

Officer Turner had difficulty in recalling the events and contradicted what he had said to the chief of police on August 11 as well as what he had testified in his deposition. He had told the police chief that there was a yard light at the Grandstaff house and in its light he saw Cox run up to a vehicle at the house after Cox had abandoned his pickup. But he testified at trial that this was incorrect, and he did not see or know the house was there at that time. About these contradictions he said: "I was very confused and it's all out of order and I would just as soon you not even use it [the statement to the police chief] because it is out of order." He testified that when Grandstaff got out of his pickup and turned around "he was motioning like he was going for something in his waist band, trying to go for a weapon." For this reason, Turner testified that he shot at the person with the intent to kill.

A .41 caliber bullet was extracted from the Grandstaff bedroom wall. Officer Roberts, who led the chase into the ranch, was the only Borger officer with a weapon that could have fired that bullet. Roberts testified that he did not fire at Cox, that his pistol was never examined, and that he had sold it. Officer Alonzo testified that he had no discussion with Roberts about Roberts' handgun that could fire the bullet found in the Grandstaff house. In his deposition he said that he asked Roberts about this very fact.

Alonzo testified that he was in the pasture to the east of the vehicle, and on its right side, as the Grandstaff pickup came down the road the second time; and when the shooting by others began, he heard over the volley of gunfire Officer

(Continued on following page)

would have been justified under Texas law in using appropriate deadly force against Lonnie Cox, there could be no justification where an innocent third person was recklessly killed. Tex.Pen.Code Ann. § 9.05 (Vernon 1974). The officers are likewise liable for Grandstaff's death on a fed-

---

(Continued from previous page)

Davis say on the public address that the subject was trying to get to the back of his vehicle. Alonzo explained that he fired his M-14 automatic rifle into the truck to show the subject that he was surrounded; and while he could not see the person, he hoped this would induce him to surrender. Four bullets struck the right side of the truck bed, and another shattered the glass at the rear of the cab.

Deputy Sheriff Ricky Morris arrived at the ranch toward the end of these events. He heard only one gunshot as he left the highway. The Borger officers had an explanation for this. Officer Davis, who had transmitted the message on the radio to the dispatcher that a man was down, testified that he went to the left side of the pickup to find Grandstaff lying facedown, groaning, with his left hand under his body. Concerned about what might be in that left hand, he said to his fellow officers: "I'm going to fire one warning shot to see if we can get a reaction out of the gentleman to show him that we were there and we meant, you know, for our own safety protection and his." Davis said he then fired into the ground as he stood over Grandstaff. Officer Ray confirmed this, saying that after Grandstaff lay on the ground he was still fumbling at his belt with his hand beneath him and that Davis fired a shot so that he would "get his hands out from underneath him." Officers Turner and Roberts agreed that this happened. Roberts said that he heard Davis shout: "Everybody hold your fire. Don't shoot. I'm going to fire a round into the ground to see if I can get him to move his hands out from underneath himself." The picture they give is of a man lying facedown in the dirt, having gone down as the target of the broadside of these officers, needing an extra shot for the sake of due attention.

Officer Davis said that except for one other shot, his was the only one he heard.

When the plaintiffs completed their case-in-chief and rested, the City rested without calling any witnesses. The chief of police did not testify.

eral civil rights claim, authorized by 42 U.S.C. § 1983 where a person, acting under color of law, deprives another of rights assured by the Constitution or federal law. No less than Texas law, the Fourteenth Amendment protection against deprivation of life without due process of law is violated when police officers using deadly force, in *conscious disregard* of substantial risk of harm to innocent parties, kill an innocent third party. *See Garner v. Tennessee,* — U.S. —, 105 S.Ct. 1694, 1700, 85 L.Ed.2d 1 (1985) ("fundamental interest in [one's] own life need not be elaborated upon").

[3] The jury found, and was entitled to find, that the defendant officers consciously disregarded a substantial risk to innocent persons, and that their use of deadly force was maliciously, wantonly or oppressively done. The evidence showed that the officers knew that third parties lived in the home from which the Grandstaff pickup came. They were aware of the possibility that an innocent resident of the house could have been in the pickup; the radio transmission at 4:33 a.m. contained a comment to the effect that they did not know if there would be "people" in the Grandstaff pickup. In testimony at the trial they admitted that they were aware of the possibility of Cox having obtained a hostage after he left his own vehicle. From their protected position in the path of the Grandstaff pickup, with five patrol units and six officers between the slow moving pickup and the exit, without awaiting any hostile act or sound, they poured their gunfire at the truck and into the person of James Grandstaff. They showed no inclination to avoid inflicting unnecessary harm upon innocent people. They simply saw a target and fired. Furthermore, the individual defendants, as peace officers of the state, were

acting under color of state law. The findings of the jury are supported in the evidence.

[4] The officers argue that without evidence and a finding that a particular defendant fired the shot that actually struck and killed Grandstaff, there can be no constitutional deprivation laid at the feet of any officer. They may as well argue that no one on a firing squad is responsible for the victim's death unless we know whose bullet first struck the heart. The firestorm that killed James Grandstaff was in all respects a joint operation: the same recklessness, the same circumstances, and the same object. Each participant was as much at fault as the others, and all are liable for the foreseeable consequences. Each officer who fired his gun encouraged others to do the same. The trial court instructed the jury: "You are instructed that anyone who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another, is regarded by the law as being just as responsible for the wrongful act as the one who actually committed it." *Francis v. Kane,* 246 S.W. 2d 279, 281 (Tex.Civ.App.—Amarillo 1951, no writ); *Anderson v. Nosser,* 438 F.2d 183, 198 (5th Cir.1971), *mod. on other grounds,* 456 F.2d 835 (en banc), *cert. denied,* 409 U.S. 848, 93 S.Ct. 53, 34 L.Ed.2d 89 (1972); *Nesmith v. Alford,* 318 F.2d 110, 119 (5th Cir.1963), *cert. denied,* 375 U.S. 975, 84 S.Ct. 489, 11 L.Ed.2d 420 (1964).

[5] That the officers acted in concert also answers the objection of the officers to the joint and several judgment. They argue that this was improper in light of *Dobson v. Camden,* 725 F.2d 1003 (5th Cir.1984), but the holding in *Dobson* was that the plaintiff recovered only for injuries inflicted by the use of excessive force and that

the defendant who was not implicated or related to that wrong was not jointly liable for those damages.

[6] The officers argue also that the plaintiffs failed to bear their burden of proving that the officers were not acting in good faith in the performance of discretionary duty and, therefore, the officers were entitled to their pleaded defense of qualified immunity. The answer to that argument is that the reckless use of deadly force was not within their discretionary authority and that the wanton and oppressive taking of a life violated clearly established law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 316 (1982). The plaintiffs needed no additional jury findings.

[7] The officers then argue that the jury did not find that the police officers' use of deadly force was a proximate cause of plaintiffs' damages. The jury found that the use of deadly force was a proximate cause of the damages sustained by James Grandstaff. There was a preliminary finding that the officers were justified in using deadly force against one believed to be Lonnie Cox, but that finding was nullified by the succeeding finding to the effect that the officers were not justified in *this* use of deadly force because, under all the circumstances, they acted recklessly. Without justficiation for their conduct, their use of deadly force was wrongful and it was found to be, as it would necessarily be, the proximate cause of the death of James Grandstaff.

III. Municipal Liability

[8-10] The City of Borger enjoys governmental immunity from the state tort claim. The liability of the City therefore depends upon the scope of 42 U.S.C. § 1983.

There is no respondeat superior liability of a municipality for the negligence, gross or ordinary, of an officer. There must be (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of constitutional right. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir.1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *Webster v. City of Houston,* 735 F.2d 838 (5th Cir.) (en banc), *rev'd. on other grounds,* 739 F.2d 993 (5th Cir.1984) (en banc).

There was a deprivation of a constitutional right, as held above, when the officers took the life of James Grandstaff without due process of law. And the policymaker for the City is clearly identified; the City does not deny that the police chief was its sole policymaker. Our remaining inquiry is this: was there some policy or custom or action attributable to the police chief that was a cause of Grandstaff's death? By properly identifying the policy, we decide the inquiry in the affirmative.

(a) Inadequate training as cause: In *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Supreme Court held that past constitutional violations by subordinates are not necessarily sufficient to prove a policy of the supervisor causally linked to subsequent constitutional deprivations. The Court could find "no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [certain named defendants]—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371, 96 S.Ct. at 604, 46 L.Ed.2d at 569. The Supreme Court has elaborated on the causal require-

ment by holding that the connection must be more than de facto; the policy must be "the moving force of the constitutional violation." *Monell*, 436 U.S. at 694, 98 S.Ct. 2037, 56 L.Ed.2d at 638; *see also Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981).

[11, 12] An "inadequate" training program alone is not ordinarily the moving force behind an injured plaintiff's harm, because the police officer who injures the plaintiff does not rely upon inadequate training as tacit approval of his conduct. It is not enough that the city could, but does not, reduce the risk of harm to the plaintiff. *See Milligan v. City of Newport News*, 743 F.2d 227 (4th Cir.1984); *Dunn v. Tennessee*, 697 F.2d 121, 128 (6th Cir.1982), *cert. denied*, 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983); *Wilson v. Beebe*, 612 F.2d 275 (6th Cir.1980); *Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120 (5th Cir.1980); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir.1977). Nor does it satisfy the causal link/moving force requirement to prove that a supervisor has failed to satisfy a general responsibility to supervise employees imposed by state law. *But see Sims v. Adams*, 537 F.2d 829 (5th Cir.1976).

The Supreme Court last spoke on the policy requirement of § 1983 in *Tuttle v. Oklahoma City*, — U.S. —, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). In *Tuttle*, inadequate training was asserted as a basis of municipal liability under section 1983. *Id.* at —, 105 S.Ct. at 2433. Justice Rehnquist, writing for the plurality, reserved the question whether a policy not itself unconstitutional, such as inadequate training, could be a policy under *Monell*. *Id.* at — n. 7, 105 S.Ct. at 2436 n. 7. Justice Rehnquist, however, wrote that until the Court answered that question a plain-

tiff relying on a policy not itself unconstitutional must have considerable proof that the policy was causally related to the constitutional deprivation, *id.* at — & n. 8, 105 S.Ct. at 2436 & n. 8, and that to be a policy, inadequate training must be a product of a conscious choice, *id.* at — & n. 7, 105 S.Ct. at 2436 & n. 7. Justice Brennan, writing for three justices, would not require that the city policy in itself be unconstitutional so long as the city is at fault for the damage suffered. He sees a more indirect causal link permitted by the statutory language providing that the victim must be "subjected" or "caused . . . to be subjected" to the deprivation of constitutional rights by the liable party. *Id.* at —, 105 S.Ct. at 2439.

We cannot know what conscious choices on the part of the city policymaker would carry the Court's policy/cause hurdle. It may not be enough that the policymaker demonstrates a conscious lack of concern whether the police force is well trained or poorly trained. We doubt that a finding of "gross" negligence in that training will always be the ticket to municipal liability. *But see Turpin v. Mailet,* 619 F.2d 196, 201-02 (2d Cir.), *cert. denied,* 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980); *Reeves v. City of Jackson,* 608 F.2d 644, 652-53 (5th Cir.1979); *Owens v. Haas,* 601 F.2d 1242, 1246-47 (2d Cir.), *cert. denied,* 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979).

[13, 14] (b) The city policy/custom of dangerous recklessness: If there is a reckless disregard for human life and safety prevalent among the city's police officers which threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitu-

tional rights. Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.

[15] That was the rationale of this court in *Languirand v. Hayden,* 717 F.2d 220 (5th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984). Conscious indifference to widespread incompetence or misbehavior may be more than a matter of extreme negligence and more than a failure to instruct or train. If it is the deliberate police policy to demand instant compliance, heedless of rights and risks, abuses—i.e., incompetence and misbehavior—will occur when officers of varying judgment and stability encounter resistance. If unconfined the policy ordains use of the ultimate compulsion, the firearm, upon any appearance of resistance and with only imagined justification. That policy employs armed officers who subject the public to the deprivation of their constitutional rights. Where the city policymaker knows or should know that the city's police officers are likely to shoot to kill without justification and without restraint, so as to endanger innocent third parties, the city should be liable when the inevitable occurs and the officers do so.

(c) The jury findings here: This trial was conducted in January of 1984, before the *Bennett* and *Webster* decisions of this court, and long before the opinions of the Supreme Court in *Tuttle.* The trial court had before it our writing in *Languirand,* and this was the basis of the instructions given to the jury and the interrogatories which composed the verdict. In this respect the City made no objection to the form of the interrogatories or to the

court's charge (except on the ground of insufficiency of the evidence).

The jury found that "the city of Borger was grossly negligent in failing to properly train its police officers" and that "serious incompetence or misbehavior was general or widespread throughout the city of Borger police force." "Gross negligence" was defined in the court's charge as "more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it." The City's consciously indifferent training of its officers was found to be a proximate cause of James Grandstaff's death.

[16] The verdict must be construed in the context of the evidence and the issues raised by the parties before the jury. The training, incompetence, and misbehavior of the Borger police placed at issue by this record implicate only the employment of deadly force with reckless disregard of the danger to human life. What the jury decided was that the City of Borger chief of police chose to operate a police force where prevalent recklessness endangered human life and safety, and that this policy choice caused Grandstaff's death.

[17] (d) The evidence: There was no direct testimony of prior misconduct within the Borger police force or of prior knowledge and state of mind of the police chief. We know from *Tuttle v. Oklahoma City*, — U.S. —, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), that isolated instances of police misbehavior are inadequate to prove the knowledge

and acquiescence by a city policymaker in that manner of conduct. That is not our case, however.

[18] An injured plaintiff is not likely to document proof of a policy or disposition, either of the policymaker or throughout the police force, that disregards human life and safety. The disposition must be inferred circumstantially from conduct of the officers and of the policymaker. Prior incidents of abusive police conduct tend to prove a pattern or custom and the accession to that custom by the policymaker. *See Bennett*, 728 F.2d at 768. But the plaintiff may encounter difficulties in making that proof, because of the lack of available credible witnesses and the avenues for dispute and distraction over the actual facts of each specific incident. No incidents prior to August 11, 1981 were proved here.

[19] The evidence does prove repeated acts of abuse on this night, by several officers in several episodes, tending to prove a disposition to disregard human life and safety so prevalent as to be police policy or custom. The entire six officers of the night shift of the City of Borger participated in this wild barrage, when the exercise of the least care and the use of any rational and organized plan would have avoided the death of James Grandstaff. They were quick to fire on the highway at Lonnie Cox, rather than at the tires of his truck. Perhaps they were returning his fire, although the jury could have found otherwise on this evidence. They kept firing at Cox in the pasture, even in the direction of the ranch house. Perhaps they were not then aware of the house, but the jury could have concluded otherwise.

The disposition of the policymaker may be inferred from his conduct after the events of that night. Follow-

ing this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made.

[20-22] This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11. See 2 Wigmore, Evidence §§ 382, 437 (Chadbourn rev.1979). As subsequent conduct may prove discriminatory motive in a prior employment decision, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), and subsequent acts may tend to prove the nature of a prior conspiracy, *see Anderson v. United States*, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (1974), so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.

After August 11, 1981, we all know of the dangerous recklessness of that police force. If the police chief had not known and approved of it beforehand, we would ex-

pect a change when he, too, learned the facts. But there is no sign of any concern except that the City avoid liability. The jury was entitled to infer that the conduct on the 6666 Ranch demonstrated the policy of the Borger city police force as approved by its policymaker, both before and after that time.

IV. The Damages

A.

[23-27] The father of James Grandstaff, Joe H. Grandstaff, was awarded $200,000 for the lost of society and companionship and for mental anguish due to the death of his son. James was his only child and their relationship was a close one. He testified that his very life was destroyed by his son's death. We look to Texas law for guidance on the damages recoverable for James Grandstaff's death. *See Brazier v. Cherry,* 293 F.2d 401 (5th Cir.), *cert. denied,* 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961). Texas allows a parent to recover for loss of society and companionship, and for mental anguish, whether or not there is any pecuniary loss. *Sanchez v. Schindler,* 651 S.W.2d 249 (Tex.1983). The prevailing view of Texas courts is that no distinction is made whether the deceased be a minor or adult child. *Estate of Clifton v. Southern Pacific Transportation Co.,* 686 S.W.2d 309 (Tex.App.—San Antonio 1985, no writ); *City of Houston v. Stoddard,* 675 S.W.2d 280 (Tex.App.—Houston 1984, writ ref'd n.r.e); *Moore v. Lillebo,* 674 S.W.2d 474 (Tex.App.—El Paso 1984, writ granted); *Bradley v. Quality Service Tank Lines,* 654 S.W.2d 562 (Tex.App.—Fort Worth), *rev'd on other grounds,* 659 S.W.2d 33 (Tex.1983). *Contra Piper Aircraft Corp. v. Yowell,* 674 S.W.2d 447 (Tex.App.1984—Fort

Worth, writ granted). To recover for mental anguish there need be no physical manifestation proved. *Missouri Pacific Railroad v. Vlach,* 687 S.W.2d 414 (Tex.App.1985 —Houston, no writ). The damage award of Joe Grandstaff was proper.

B.

[28] James Grandstaff's widow and stepsons recovered damages against the City and the officers for their own emotional injuries suffered as bystanders when they witnessed the gunfire directed at Grandstaff in his pickup truck. We conclude that, under Texas law, this recovery is proper against the officers, but that it is not permitted under § 1983 and may not therefore be recovered from the City.

[29, 30] To recover for the tort of negligent infliction of emotional distress to a bystander, Texas courts require that the bystander be closely related to the victim and that the bystander suffer an emotional trauma as the result of a contemporaneous perception of the event from a nearby location. *Landreth v. Reed,* 570 S.W.2d 486 (Tex. Civ.App.—Texarkana 1978, no writ); *Genzer v. City of Mission,* 666 S.W.2d 116 (Tex.App.—Corpus Christi 1983, writ ref'd n.r.e.); *Dawson v. Garcia,* 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ); *Haught v. Maceluch,* 681 F.2d 291 (5th Cir. 1982). The two stepsons were minors living with the James Grandstaff family, and we believe they stood in the close relationship required by Texas law. *See Genzer,* 666 S.W.2d at 122 (court looked to closeness of relationship, not degree of consanguinity, between vic-

tim and her grandparents in allowing grandparents to recover).

[31, 32] We fail to see, however, that these bystanders have proved an independent cause of action under § 1983. Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. "Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan,* 443 U.S. 137, 146, 99 S.Ct. 2689, 2695-96, 61 L.Ed.2d 433 (1979). Lois Sharon Grandstaff, Charles Robert Gatlin, and Randy Gatlin may not recover these damages from the City of Borger.

V. Judgment

The judgment of the district court is affirmed in all respects except for the recovery from the City for the emotional injury to Lois Sharon Grandstaff and to Randy and Robert Gatlin as bystanders. The case is remanded to the trial court to modify the damage award, to assess attorney's fees and costs expended in this appeal, and to consider the applicability of the recent Texas Supreme Court's decision on prejudgment interest. *Cavnar v. Quality Control Parking* (28 Sup.Ct.J. 466, June 5, 1985).

AFFIRMED IN PART; MODIFIED IN PART, AND REMANDED.

GARWOOD, Circuit Judge, dissenting in part.

I respectfully dissent from the affirmance of the judgment against the City. I agree with the general test set forth by the majority for municipal liability under 42 U.S.C. § 1983 in cases of this kind.

> "If there is a reckless disregard for human life and safety prevalent among the city's police officers which threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitutional rights."

However, the majority goes on to hold that the existence of such policy level "instruction or example or acceptance" can be inferred here because after the event there was "no sign of any concern except that the city avoid liability." As a logical, factual matter this is simply too big a leap, given the absence of evidence of any prior actual or claimed reckless action by Borger police or of any prior conduct by Borger officials which could fairly be considered an authorization, approval or condonation of police recklessness. Surely a police chief's *unexpressed* "preexisting disposition" is not a *city* "policy" within the majority's, or any other reasonable, definition. There is no evidence of any prior expression of the inferred "preexisting disposition." We are seeing cloud castles. A "policy" has been created out of thin air. What we are really doing is punishing the City, not for wrongfully or unconstitutionally bringing about this tragedy, but for its post-event callousness. That is not actionable under section 1983, and even if it were, none of the kind of damages awarded here would be recoverable for it. Accordingly, I dissent.*

---

* As I would hold that the City's liability has not been established, I do not reach the perhaps even more difficult question of whether a non-dependent parent can recover under section 1983 for grief over the death of a married adult child maintaining a separate household. Such recovery has apparently been authorized under the Texas Wrongful Death stat-

(Continued on following page)

(Continued from previous page)

ute since 1983. *See Sanchez v. Schindler,* 651 S.W.2d 249 Tex.1983). Section 1983 recovery is limited to "the party injured," the "citizen" whose federal rights have been invaded. However, in *Brazier v. Cherry,* 293 F.2d 401 (5th Cir.), *cert. denied,* 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961), we relied on 42 U.S.C. § 1988 as authority to look to state survival and wrongful death statutes in section 1983 actions because "in a very real sense" this "does not do more than create an effective remedy" and "merely assures that there will be a remedy." *Id.* at 409. Given that the nature of the damages awarded the father here were generally not recoverable when sections 1983 and 1988 were enacted, *see Michigan Central R.C. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 196, 57 L.Ed. 417 (1913); *Sanchez v. Schindler,* 651 S.W.2d at 255 (dissenting opinion); Restatement (Second) Torts § 925, comment *e,* and *unlike* pecuniary loss or survival damages, can in no "real sense" be regarded as some sort of rough proxy for the deceased's damages, there is room for doubt that section 1988 or the *Brazier* rationale warrant such recovery merely because it has now become, over a century later, available under state law. Whether the father is entitled to such a recovery *apart* from state law is an open question in this Circuit. *See Logan v. Hollier,* 711 F.2d 690 (5th Cir.1983). Other authorities are divided. *Compare Jackson v. Marsh,* 551 F.Supp. 1091 (D. Colo.1982) and *White v. Talboys,* 573 F.Supp. 49 (D.Colo.1983) (no recovery) with *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir.1984) and *Myres v. Rask,* 602 F.Supp. 210 (D.Colo. 1985) (recovery). In contrast to the protections afforded the spousal and parent-minor child relationships, the common law did not recognize any action for injury to the parent-adult child relationship. *See* Restatement (Second) Torts § 703, comment *f. See also* § 699. *Cf.* §§ 683, 693 (spousal); §§ 700, 701, 703 (parent-minor child). Although the Constitution may protect some aspects of the parent-adult child relationship, so that section 1983 damages may be recoverable where the *illegality* of the complained of governmental action consists, in whole or in part, of interference with or failure to give proper recognition to that relationship as such, *cf. Brantley v. Surles,* 718 F.2d 1354 (5th Cir.1983) (public school employee discharged for child's attendance at private school), it does not necessarily follow that such damages are recoverable where, as here, the parent-adult child relationship is only fortuitously and indirectly related to the wrongdoing.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-1241 and
84-1337

D. C. Docket No. CA-2-81-220

Sharon GRANDSTAFF, Individually and As Representative of the Estate of James C. Grandstaff; and Kay La-June Grandstaff, As Next Friend of Jo Cheryl Grandstaff, A Minor, et al., Plaintiffs-Appellees, Cross-Appellants,

v.

The CITY OF BORGER, TEXAS, et al., Defendants-Appellants, Cross-Appellees.

Sharon GRANDSTAFF, Individually and As Representative of the Estate of James C. Grandstaff, et al., Plaintiffs-Appellees,

v.

The CITY OF BORGER, TEXAS, et al., Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

---

Before GOLDBERG, REAVLEY, and GARWOOD, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause are affirmed in part; modified in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

August 5, 1985

GARWOOD, Circuit Judge, dissenting in part.

ISSUED AS MANDATE: JAN 22 1986

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-1241 and 84-1337

SHARON GRANDSTAFF, Individually and as Representative of the Estate of James C. Grandstaff; and KAY LAJUNE GRANDSTAFF as Next Friend of Jo CHERYL GRANDSTAFF, a minor, ET AL.,

Plaintiffs-Appellees,
Cross-Appellants,

v.

THE CITY OF BORGER, TEXAS, ET AL.,

Defendants-Appellants,
Cross-Appellees.

OPINION

Filed January 8, 1986

Before: Irving L. Goldberg, Thomas M. Reavley and Will Garwood, Circuit Judges.

Per Curiam

Concurrence by Judges Higginbotham and Jones

Dissent by Judge Hill, joined by Chief Judge Clark, and Judges Gee, Garwood and Davis

Appeals from ahe United States District Court
for the Northern District of Texas
Mary Lou Robinson, District Judge, Presiding

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 5, 1985, 5th Cir. 1985, 767 F.2d 161)

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are

in regular active service not having voted in favor of it. (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before: Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Randall, Tate, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill, and Jones, Circuit Judges.

PATRICK E. HIGGINBOTHAM and EDITH H. JONES, Circuit Judges, concurring in denial of petition for rehearing:

While sympathetic with the concerns expressed by Judge Garwood in his original dissent, and repeated in the dissent from denial for rehearing en banc, we do not seek a rehearing en banc in this case. We do not read the panel opinion as opening new vistas of governmental liability. Rather, we see the opinion as responsive to a unique fact situation. We are also persuaded that reconsideration of this case en banc will generate more confusion and uncertainty than has the panel opinion.

ROBERT M. HILL, Circuit Judge, with whom Charles Clark, Chief Judge, Thomas Gibbs Gee, Will Garwood, and W. Eugene Davis, join dissenting:

I write the following in dissent of the decision to deny rehearing en banc in this case.

My displeasure in the opinion of the majority in this case lies in only one aspect thereof: the holding that the City of Borger is liable to the plaintiffs under 42 U.S.C. § 1983. The majority opinion in this case by holding that the City of Borger is liable to the plaintiffs because of a

city policy derived from (1) the conduct of the police officers during the incident giving rise to this case and (2) the conduct of city officials in failing to reprimand, discharge and admit errors of its police force has deviated egregiously from the Supreme Court's and our circuit's holdings as to the requirements for a municipality's liability under § 1983.

In this circuit the basis for establishing municipal liability under § 1983 has been clearly articulated in two significant en banc decisions. In *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (en banc), we recognized in accordance with the teachings of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a city may violate a person's civil rights through a formally declared policy, i.e., by direct orders or promulgations, or through an informal acceptance of a course of action or conduct by its employees, i.e., custom or usage. In *Bennett* "custom or usage" was defined as "persistent and widespread . . . practices," a "systematic maladministration" of the laws, practices that are "permanent and well settled," and "deeply embedded traditional ways of carrying out . . . policy." 728 F.2d at 768 (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 173-74, 90 S.Ct. 1598, 1617, 26 L.Ed.2d 142 (1970)). The *Bennett* court emphasized that before liability of a municipality under § 1983 can exist for a course of action or conduct by city employees there must be a certain causal relationship between the offending action or conduct and a city policy maker:

> In the context of the question of city liability for such persistent conduct of its employees, i.e., conduct that has become a *traditional* way of carrying out policy and has acquired the force of law, the *persistent* con-

> duct must be attributable to the source of policy or law of the city, its governing body.

728 F.2d at 768 (emphasis added) (footnote omitted). The court went on to further point out that "isolated violations are not the persistent, often repeated, constant violations that constitute custom or policy." 728 F.2d at 768 n.3.

A short time later, in *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984) (en banc) (per curiam), we again addressed the issue of a city's liability under § 1983 based on the enunciated policy or on a policy founded on custom. The *Webster* court stated:

> A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy.
>
> Official policy is:
>
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A *persistent, widespread practice* of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is *so common and well settled as to constitute a custom that fairly represents municipal policy.* Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

735 F.2d at 841 (emphasis added).

Our holdings in *Bennett* and *Webster* that proof of prior incidents of misconduct was an essential element to the establishment of the liability of a city through a policy based on custom were foreshadowed by our earlier holding in *Languirand v. Hayden*, 717 F.2d 220 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 2656 (1984). In *Languirand* we discussed the proof required to hold a city liable under § 1983 when the basis for doing so is the failure to train its police force. We stated:

> We conclude that if there is a cause of action under section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, *in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.*

717 F.2d at 227-28 (emphasis added).

The requirement of our holdings calling for proof of more than merely a single incident of misconduct before municipal liability can be established under a custom theory was recently addressed by the Supreme Court in *City of Oklahoma v. Tuttle*, — U.S. —, 85 L.Ed.2d 791 (1985). The plurality of the Court in discussing the proof necessary to establish a city's liability under a setting of inadequate police training stated:

> But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

— U.S. at —, 85 L.Ed.2d at 804 (footnotes omitted).[1] In summary, the foregoing precedents establish two ways in which the plaintiffs in *Grandstaff* could have established liability against the City of Borger under § 1983.

The first way the liability of the city could have been established would have been proof that the city had adopted an unconstitutional policy, that is, a policy inherently designed to deprive citizens of their rights which resulted in Grandstaff's death. Had this been the situation, then by establishing that the city formally adopted an unconstitutional policy (such as the use of excessive force by its police in performing their duties), a *single incident* performed in furtherance of the policy that gives rise to a complained of injury would suffice to make the city liable under § 1983. This theory was not at issue in this case.

The second way the liability of the city could have been established would have been proof that policy-making officials of the city adopted a policy, not in and of itself unconstitutional (such as inadequate training of its police force), but the implementation of which amounted to gross

---

[1]The plurality also indicated that it was not expressing an opinion whether "inadequate training" would meet the policy requirements of *Monell*, and, if so, whether a more conscious decision by a responsible official than mere "gross negligence" in the establishment of police training practice would suffice to prove a policy that was the "moving force" behind subsequent unconstitutional conduct. — U.S. at —, n.7, 85 L.Ed.2d at 804 n.7.

negligence, that is, a conscious indifference to the rights, welfare and safety of citizens affected by the policy. Under this theory, in order to establish that the policy in question was the "moving force" behind the conduct charged to be unconstitutional, proof would be required that the offending city employee acted in the belief that his conduct met the expectations of city policymakers. Such proof necessarily requires evidence of a custom, that is, proof of similar incidences of official wrongdoing or general or widespread incompetence of or reckless misbehavior by city personnel and that the city employee acted accordingly. It is this theory on which the majority of the panel relies to hold the city liable.

The record in this case is devoid of prior incidents of misconduct by police similar to those which occurred on the evening that Grandstaff met his death. The record is also devoid of any evidence prior to the incident in question demonstrating incompetence or reckless misbehavior by members of the police force. The majority, however, makes up for this deficiency in the record. To support its conclusion that an unconstitutional policy was in existence at the time of Grandstaff's death, the majority relies on the jury's findings that the city was "grossly negligent in failing to properly train its police officers," that "serious incompetence or misbehavior was widespread throughout the City of Borger police force."[2] and that the city's consciously indifferent training of its officers was a "proximate cause" of Grandstaff's death. The majority's

---

[2]"Gross negligence" was defined in the court's charge as "more than momentary thoughtlessness, inadvertance or error of judgment. It means . . . conscious indifference to the rights of [others]."

analysis of these findings is that the police chief of Borger "chose to operate a police force where prevalent recklessness endangered human life and safety, and that this policy choice caused Grandstaff's death." 767 F.2d at 171.

In reaching this holding, the majority, like the jury, was unable to rely on evidence of a prior pattern of similar misconduct of the police force resulting in injury to citizens or on evidence of serious incompetence or misbehavior throughout the police force. In order to make up for this deficiency in the evidence, the majority resorted to what it describes as the repeated acts of abuse of the police officers on the evening in question and also the failure of city officials to take disciplinary action against the offending officers after the incident.[3]

In light of our holdings in *Languirand*, *Bennett*, and *Webster*, and the Supreme Court's recent decision in *Tuttle*, the facts of this case do not give rise to liability on the part of the city. No fanciful structuring of the conduct of these officers on the evening in question can suffice as evidence of conduct that is "permitted and well settled," "persistent and widespread," a "systematic maladministration" or "deeply embedded traditional ways"—the type of conduct required under the case law to prove a "policy."

---

[3]The majority also opted for a definition which permits a finding of a policy when the evidence supports merely a "disposition" to effect a cause of action by a policy maker. This is a less stringent definition than that referred to by the Supreme Court in *Tuttle:* "One well-known dictionary, for example, defines 'policy' as a 'definite course or method of action selected from among alternates and in light of given conditions to guide and determine present and future decisions.' Webster's Ninth Collegiate Dictionary 910 (1983)." — U.S. at — n.6, 85 L.Ed.2d at 804 n.6.

The "isolated" event, i.e., the incident in question, on which this case is founded is simply not enough. The following language from *Webster* bears out the requirement of a persistency of conduct before a policy can be found:

> If actions of city employees are to be used to prove a custom for which the municipality is liable, those actions *must* have occurred for *so long or so frequently* that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the *expected, accepted practice of city employees.*

738 F.2d at 842 (emphasis added). If the questioned conduct of a city employee alone be deemed sufficient to infer a policy, then our previous requirements in this area are negated.

Nor is it any aid to the majority's holding that the city failed to later discipline the officers for their conduct on this occasion. The post-event failure to discipline the officers (call it as the majority does callous in nature if one must) cannot supply the necessary linkage to establish a city policy. An after-the-fact failure to discipline illegal conduct is by itself no evidence of a before-the-fact policy of illegal conduct. It might be evidence of a policy commencing from that point in time when no discipline was invoked, but certainly not before. We so held in *Berry v. McLemore,* 670 F.2d 30 (5th Cir. 1982), where a police chief committed an aggravated assault on a person he was attempting to issue a traffic citation. We stated that a municipal policy of authorizing policy misconduct "cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality."

670 F.2d at 33 (citing *Landigran v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980), and *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir.), *cert. denied*, 449 U.S. 1016 (1980)).[4]

The majority has also failed to cite any precedent for the proposition that proof of post-event conduct in a § 1983 case is sufficient to uphold a jury finding of a pre-event policy. The cases relied upon in the opinion are non-§ 1983 cases, and show only that motive in a Title VII action may be shown by subsequent conduct, *see McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973), and that criminal conspiracy may be proven by subsequent acts, *Anderson v. United States*, 417 U.S. 211 (1974).

The "moving force" causation requirement has not been met here because the police officers were not shown to be *aware* of any city policy within which their conduct was patterned, there being no policy deducible by the officers through the conduct of city officials in either approving or condoning past similar conduct. If a policy did not have its genesis before the officers acted, then their awareness of policy also could not be inferred by the city's post-event failure to take remedial steps to prevent future conduct in a similar vein.

Since plaintiffs failed to establish the City of Borger's liability under § 1983, I accordingly dissent from the denial of the petition for rehearing en banc.

---

[4]In *Berry* the court found no inference of a city policy was possible when an independent investigation of the questioned event had taken place and the city followed the recommendation of the investigator in not invoking discipline against the chief of police. In *Grandstaff* there is also a suggestion in the evidence that the Texas Rangers were called on to make an investigation of the conduct of the officers on the occasion in question, but there is no indication of what these recommendations might have been.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION NO. CA-2-81-220

SHARON GRANDSTAFF, ET AL.,

PLAINTIFFS,

V.

THE CITY OF BORGER, TEXAS, ET AL.,

DEFENDANTS.

CHARGE TO THE JURY

(Filed February 3, 1984)

MEMBERS OF THE JURY:

This case is submited to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this charge.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Do not let bias, prejudice, or sympathy play any part in your deliberations.

Do not consider any statement which I have made, either in the course of the trial or in these instructions, as an indication that I have any opinion about the facts of the case.

Do not decide who you think should win and then try to answer the questions accordingly. You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers as your answers and verdict must be unanimous.

All special issues, or questions, are to be answered by you from a preponderance of the evidence. The phrase "preponderance of the evidence" means the greater weight and degree of credible evidence before you. It means evidence which, when weighed against the evidence opposed to it, has the more convincing force — evidence which satisfies the conscience and brings conviction to an intelligent mind. The preponderance of the evidence does not depend upon the number of witnesses nor the number of documents, but means when the evidence is weighed in its entirety that the jury is convinced that it is more probable than not that a fact or an occurrence in issue exists.

Whether a party has met its burden of proof should be determined by you not on the basis of fragments or parts of the evidence, but you should consider all of the evidence bearing upon the issue as a whole and irrespective of

whether the evidence was brought out by direct examination, cross-examination or by one party or the other. The determination of whether the case has or has not been proved by a preponderance of the evidence is not an exact or mathematical process, but it is a problem of judgment and common sense.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

I indicated a moment ago that you are the sole judges of the credibility of each witness and the weight to be given to his testimony. In weighing the testimony of each witness the jury should consider, among other things, the witness's relationship to the parties in the case; the witness's interest, if any, in the outcome of the case; his manner of testifying; his candor, fairness and intelligence; and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent recollection, like failure of recollection, is not an uncommon experience. In weiging the effect of a discrepancy, consider whether is pertains to a matter of importance or an unimportant detail, and whether it results from innocent error or willful falsehood.

In judging the credibility of a witness and in evaluating his testimony, you may also consider any prior statements which may have been given by that witness provided you find that the witness actually made such a statement and understood it when he made it. You may consider any such prior statements as a guide in determining the truth of what that witness told you from the witness stand in this Courtroom.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds.

The testimony of a single witness, which produces in your minds the belief in the likelihood of truth, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after fully considering all the evidence in the case, you hold greater belief in the accuracy and honesty of the one witness.

Generally speaking there are two types of evidence which you may consider in properly finding the truth as to the facts in the case. One is direct evidence — such as testimony of an eyewitness. The other is indirect or circumstantial evidence — the proof of a chain of circumstances which points to the existence or nonexistence of certain facts. As a general rule the law makes no distinction between direct and circumstantial evidence, but simply

requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

Insofar as the testimony of an expert witness is based on personal observation of particular facts and conditions, it is to be considered by you the same as that of any other witness. However, the opinions of experts based on hypothetical assumptions of fact, do not tend to prove the assumed facts upon which the opinions are based. The actual facts mut be found by the jury from the basic evidence itself and not from assumptions of fact adopted by expert witnesses in forming opinions or in preparing summaries, computations, or other exhibits.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

During the trial of this case, certain testimony has been read to you by way of deposition, consisting of sworn

written answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the Case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand is usually presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way, so far as possible, as if the witness had been present and had given from the witness stand the same testimony as given in the deposition. No adverse inference may be drawn from the fact that a witness whose deposition was read in evidence did not also appear as a witness at the trial.

You must not treat any statement by the attorneys in the case made during the trial or in their arguments as evidence or proof of any fact in issue. I instruct you that while it is the duty of counsel to address you and to explain the testimony to enable you better to understand the questions which you are to decide, if counsel mistake the law or misstate the evidence, you will follow the law as given to you by the Court in these instructions and not as stated by counsel, and you will take the evidence detailed by the witnesses and shown by the documents introduced instead of the statements of counsel.

In your deliberations you must not consider or discuss objections made by any of the attorneys, whether those objections were sustained or overruled. Counsel not only have the right but it is their duty to make objections when, in their opinion, the receipt of any evidence or any procedure taken or proposed would be contrary to legal rules.

When the Court has sustained an objection to a question, the jury is to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

You observed during the course of the trial that from time to time one or more of the attorneys came to the bench for a conference which, of course, you were unable to hear. You are admonished not to draw any unfavorable inference or inferences from those conferences for or against any of the parties to the case. If the Court felt that the jury should hear anything that was discussed out of your hearing at the bench, the Court permitted that to be presented to you in open court.

Under the rules of evidence, the Court has permitted counsel for both sides to examine various witnesses as so-called adversary or unfriendly witnesses. In so doing, you will recall that counsel stated many affirmative statements, as if they were statements of fact, and then asked the witness whether or not they were true. That is proper cross-examination of an adverse witness. You should be particularly mindful of the answers given by the witnesses to each such question because it is the answer of the witness that must be evaluated by you. Because counsel words a question as a statement of fact is not evidence of that fact; only the answers given by the witnesses are the evidence.

Further, you are instructed that no significance should be attached to cooperation of counsel for defendants during the course of the trial. This practice is quite normal in cases involving multiple parties.

Moreover, each party to a lawsuit is entitled to be represented by counsel of his own choice, and where, as

here, there are a number of defendants, it is proper for several of these defendants to employ the same attorney to represent them in litigation. I therefore instruct you that the fact that several defendants in this action are represented by the same counsel has no relevance or bearing on any of the issues which are being submitted to you in arriving at a verdict in this case.

Each defendant in this case is entitled to individual consideration of the evidence as applied to each one of them.

I also instruct you that in your consideration of this case, you are to disregard any information about the case which may have been received from sources outside of this trial. If any of you have read any newspaper articles or heard any radio broadcasts or telecasts relative to this case, I want to caution you particularly that you are to put any such information entirely out of your consideration in this case, and you are to confine your consideration solely to the evidence presented in this trial.

If during the course of your deliberations, you wish to communicate with the Court, you should do so only in writing by a written note handed to the bailiff and signed by the Foreman.

When you are retired to the jury room to deliberate upon your verdict, you may take this charge with you as well as exhibits which the Court has admitted into evidence. You will select your foreman, and after you have reached your unanimous verdict, you will return this charge together with your written answers to special issues. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

You are further advised that the law does not require a jury to talk with anyone after he has reached his verdict unless the Court orders otherwise. You are under no obligation to discuss this case with anyone unless and until the Court orders otherwise.

In particular, the rules of the Court prohibit any of the parties or their attorneys from contacting you, your relatives or your friends after the conclusion of this trial, without permission of the Court. If any of them do contact you, you should immediately report that contact to the Court.

Your Foreman will sign in the space provided after you have reached your verdict.

/s/ Mary Lou Robinson
United States District Court

Date: January 31, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION NO. CA-2-81-220

SHARON GRANDSTAFF, ET AL.,

PLAINTIFFS,

V.

THE CITY OF BORGER, TEXAS, ET AL.,

DEFENDANTS.

VERDICT OF THE JURY

(Filed February 3, 1984)

We, the jury, have unanimously agreed to the answers to the attached special issues and return such answers in open court, and under the instructions of the Court, as our verdict in this cause.

/s/ Raymond L. Burch
Foreman

Date: 3 Feb. 84

DEFINITIONS

An act or failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, toward the injured person individually.

An act or failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

"Proximate Cause" means that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

However, even where a person's act or omission is in fact a cause of harm, in the sense that the harm would not otherwise have occurred, the person's act or omission is not a proximate cause of damages sustained by one who has been harmed unless, from the standpoint of a reasonable man, the person's act or omission has in some degree increased the risk of that harm.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

"*New and Independent Cause*" means the act or omission of a separate and independent agency, not reasonably foreseeable, which destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question, and thereby becomes the immediate cause of such occurrence.

"*Ordinary Care*" means that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances.

"Negligence" means failure to use ordinary care; that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Gross Negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it.

In this case Plaintiffs claim damages alleged to have been sustained by James C. Grandstaff as the result of a deprivation of a right secured to him both by the Constitution of the United States and by an Act of Congress providing for equal rights of all persons within the jurisdiction of the United States.

Specifically, Plaintiffs allege that, on the early morning of August 11, 1981, the individual Defendants subjected James C. Grandstaff to a deprivation of rights and privileges secured and protected to him by the Constitution and laws of the United States, namely:

(1) The constitutional right not to be deprived of his liberty without due process of law;

(2) the constitutional right not to be deprived of his life without due process of law; and

(3) the constitutional right to prompt and adequate medical care for severe and obvious injuries while under arrest.

You are instructed as a matter of law that under the Constitution of the United States every citizen has the right to liberty, that is, the right not to be arrested without due process of law. Every person also has the constitutional right to his life, that is, the right not to be deprived of his life without due process of law.

Plaintiffs also claim that the Defendants used excessive force against James C. Grandstaff while he was under arrest and that they suffered emotional injury from seeing the circumstances surrounding his death.

You are instructed that anyone who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another, is regarded by the law as being just as responsible for the wrongful act as the one who actually committed it.

You are instructed that under the law of the State of Texas, city police officers and sheriff's deputies are peace officers.

It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. In every case where he is authorized by law, he shall interfere without a warrant to prevent or suppress crime. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and be tried.

A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. A traffic violation, resisting arrest or firing a gun at a police officer are examples of offenses. Firing a gun at a police officer and kidnapping are felony offenses.

Also, where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

A city policeman who begins pursuit of an offender within his own city can continue such pursuit, if necessary, even though the continued pursuit leads him outside the corporate limits of the city and outside the county.

A peace officer who is lawfully seeking to arrest an offender may seek the assistance of other peace officers and they may lawfully come to his assistance.

The law does not guarantee that only the guilty will be arrested.

An arrest is lawful if, at the instant of arrest, the facts and circumstances within the peace officer's knowledge and of which he has reasonably trustworthy information warrant belief by a prudent person that a crime has been or is being committed by the person being arrested.

If an officer makes an arrest without a warrant and the basis for such arrest is information supplied to the arresting officer by another officer through a police radio broadcast, then the arrest is lawful if, at the time of the broadcast, the facts and circumstances within the broadcasting officer's knowledge and of which he has reasonably trustworthy information warrant belief by a prudent person that a crime has been or is being committed by the person being arrested.

In determining whether an officer had reasonable grounds to believe that a person has committed an offense, the facts known to him need not meet the standard of conclusiveness upon which a conviction must be based; but, rather, the acts of the officer in making an arrest are to be measured by the test of what a reasonable person would have believed under the same circumstances.

A person is arrested when he has been actually placed under restraint or taken into custody by an officer arresting without a warrant. Actual contact with the person arrested is not necessary to constitute an arrest. Moreover, the fact of arrest can be shown by surrounding facts and circumstances.

You are further instructed that any peace officer may arrest, without a warrant, a person found in a suspicious place and under circumstances which reasonably show that that person has been guilty of some felony or breach of the peace, or threatens, or is about to commit some offense against the laws.

SPECIAL ISSUE NO. 1(a)

For each of the following defendants, do you find from a preponderance of the evidence that he arrested James C. Grandstaff?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	NO

If you did not answer "yes" as to any Defendant in Special Issue No. 1(a), then do not answer Special Issues Nos. 1(b), 1(c), 1(d), 1(e), and 1(f).

The Defendants assert that they are not liable because they were performing a discretionary function. Peace officers performing discretionary functions, such as arresting a person, are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The constitutional right of each person not to be arrested without a warrant unless the arresting officer can show probable cause for making the arrest *is* a clearly established constitutional right. Here, it is undisputed that James C. Grandstaff, if arrested, was arrested without a warrant. Thus the burden is on an arresting officer to show from a preponderance of the evidence that probable cause existed for making the arrest.

The Defendants claim that they had probable cause to arrest James C. Grandstaff because, at the time he was arrested, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information would warrant belief by a prudent person (1) that the man in the pickup truck on the caliche road was Lonnie Cox, and (2) that Lonnie Cox had committed or was committing a crime.

You are instructed that if the peace officers reasonably believed that James C. Grandstaff was Lonnie Cox, then they had probable cause to arrest James C. Grandstaff if they had probable cause to arrest Lonnie Cox.

SPECIAL ISSUE NO. 1(b)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 1(a), do you find from a preponderance of the evidence that he had probable cause to arrest James C. Grandstaff without a warrant?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

A "Sudden Emergency" is an emergency arising suddenly and unexpectedly, not proximately caused by the negligence of the peace officer, and which to a reasonable peace officer, with such natural aptitude or special training as to give him the ability to cope with those dangerous situations which are likely to arise in the course of police activities, requires immediate action without time for deliberation.

SPECIAL ISSUE NO. 1(c)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 1(a), do you find from a preponderance of the evidence that he was confronted by a sudden emergency at the time he arrested James C. Grandstaff?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

SPECIAL ISSUE NO. 1(d)

For each of the defendants, if any, for whom you answered Special Issue No. 1(c) "yes", do you find from a preponderance of the evidence that after such emergency arose, he acted as a reasonable peace officer would have acted under the same or similar circumstances?

Answer "yes" or "no".

Alonzo	NO
Turner	NO
Roberts	NO
Ray	NO
Morris	.....

SPECIAL ISSUE NO. 1(e)

For each of the defendants, if any, for whom you answered "no" in Special Issue No. 1(b), do you find from a preponderance of the evidence that his arrest of James C. Grandstaff was a proximate cause of damages sustained by James C. Grandstaff?

Answer "yes" or "no".

Alonzo	.....
Turner	.....
Roberts	.....
Ray	.....
Morris	.....

SPECIAL ISSUE NO. 1(f)

For each of the defendants, if any, for whom you answered "no" in Special Issue No. 1(b), do you find from a preponderance of the evidence that his arrest of James C. Grandstaff was maliciously, wantonly, or oppressively done?

Answer "yes" or "no".

Alonzo .....
Turner .....
Roberts .....
Ray .....
Morris .....

The constitutional right not to be deprived of life without due process of law *is* a clearly established constitutional right. Here, it is undisputed that James C. Grandstaff was deprived of his life. The burden is on each peace officer who used deadly force against James C. Grandstaff to show from a preponderance of the evidence that he was justified under the laws of the State of Texas when he used deadly force against James C. Grandstaff.

You are instructed that if the peace officers reasonably believed that James C. Grandstaff was Lonnie Cox, then they were justified in using deadly force against James C. Grandstaff to the extent, but only to the extent, that they would have been justified in using deadly force if they were correct in their belief that he was Lonnie Cox.

"Deadly force" means force that is intended or known by the peace officer to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ.

You are instructed that under the laws of the State of Texas, as set forth in the Penal Code, a peace officer is justified in using deadly force against a person when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, if:

(1) the peace officer reasonably believes that the arrest is lawful; and

(2) before using deadly force, the peace officer manifests his purpose to arrest and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested; *and either*

(3a) the peace officer reasonably believes that the conduct for which arrest is authorized included the use or attempted use of deadly force; *or*

(3b) the peace officer reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the peace officer or another if the arrest is delayed.

A peace officer is under no duty to retreat before using deadly force.

"Reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the peace officer.

SPECIAL ISSUE NO. 2(a)

For each of the following defendants, do you find from a preponderance of the evidence that he used deadly force against James C. Grandstaff?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	NO

SPECIAL ISSUE NO. 2(b)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(a), do you find from a preponderance of the evidence that his use of deadly force against James C. Grandstaff was a proximate cause of damages sustained by James C. Grandstaff?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

SPECIAL ISSUE NO. 2(c)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(a), do you find from a preponderance of the evidence that he was justified under the laws of the State of Texas when he used deadly force against James C. Grandstaff?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

SPECIAL ISSUE NO. 2(d)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(c), do you find from a preponderance of the evidence that his use of deadly force against James C. Grandstaff was reckless?

You are instructed that a peace officer acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care than an ordinary person would exercise under all the circumstances as viewed from the peace officer's standpoint.

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

Even if a peace officer was justified under the laws of the State of Texas when he used deadly force against James C. Grandstaff that justification is unavailable as a defense in this lawsuit if his use of deadly force recklessly killed an innocent third person.

SPECIAL ISSUE NO. 2(e)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(a), do you find from a preponderance of the evidence that he was confronted by a sudden emergency at the time he used deadly force against James C. Grandstaff?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

SPECIAL ISSUE NO. 2(f)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(e) do you find from a preponderance of the evidence that after such emergency arose, he acted as a reasonable peace officer would have acted under the same or similar circumstances?

Answer "yes" or "no".

Alonzo	NO
Turner	NO
Roberts	NO
Ray	NO
Morris	.....

SPECIAL ISSUE NO. 2(g)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(a), do you find from a preponderance of the evidence that his use of deadly force against James C. Grandstaff was maliciously, wantonly or oppressively done?

Answer "yes" or "no".

Alonzo	YES
Turner	YES
Roberts	YES
Ray	YES
Morris	.....

Plaintiffs' third claim is that James C. Grandstaff was deprived of his constitutional right to prompt and adequate medical care for severe and obvious injuries while under arrest. As previously stated, the Constitution protects the right of every person under arrest to prompt and adequate medical care for severe and obvious injuries. In order for you to find that James C. Grandstaff was deprived of this right, however, you must find that the officers who had him under arrest were deliberately indifferent to his serious medical needs. Deliberate indifference is a cold-hearted, casual unwillingness to investigate what can be done for a man who is obviously in desperate need of help. In other words, conscious cruelty.

However, "deliberate indifference" must be just that —an accidental or inadvertent failure to provide adequate care is not deliberate indifference, nor is an earnest but unsuccessful attempt to care for a person under arrest.

SPECIAL ISSUE NO. 4(a)

For each of the following defendants, do you find from a preponderance of the evidence that he was deliberately indifferent to James C. Grandstaff's serious medical needs?

Answer "yes" or "no".

Alonzo	NO
Turner	NO
Roberts	NO
Ray	NO
Morris	NO

SPECIAL ISSUE NO. 4(b)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 4(a), do you find from a preponderance of the evidence that his deliberate indifference to James C. Grandstaff's serious medical needs was a proximate cause of damages sustained by James C. Grandstaff?

Answer "yes" or "no".

Alonzo .....
Turner .....
Roberts .....
Ray .....
Morris .....

Plaintiffs' fourth claim is that excessive force was used by the peace officers while James C. Grandstaff was under arrest. The Plaintiffs allege that the manner in which James C. Grandstaff was handcuffed, moved and otherwise restrained, inflicted unnecessary pain on him between the time he was shot and the time he died.

You are instructed that a peace officer is entitled to use as much force as is reasonably necessary to effect a lawful purpose, such as handcuffing an arrestee or moving him to a different location.

SPECIAL ISSUE NO. 5(a)

For each of the following Defendants, do you find from a preponderance of the evidence that he used more force than was reasonably necessary to effect and maintain the detention of James C. Grandstaff?

Answer "yes" or "no".

Alonzo	NO
Turner	NO
Roberts	NO
Ray	NO
Morris	NO

SPECIAL ISSUE NO. 5(b)

For each of the Defendants, if any, for whom you answered "yes" in Special Issue No. 5(a), do you find from a preponderance of the evidence that his use of excessive force on James C. Grandstaff was a proximate cause of damages sustained by James C. Grandstaff?

Answer "yes" or "no".

Alonzo	.....
Turner	.....
Roberts	.....
Ray	.....
Morris	.....

SPECIAL ISSUE NO. 5(c)

For each of the following Defendants, if any, for whom you answered "yes" in Special Issue No. 5(a), do you find from a preponderance of the evidence that his use of excessive force against James C. Grandstaff was maliciously, wantonly or oppressively done?

Answer "yes" or "no".

Alonzo	.....
Turner	.....
Roberts	.....
Ray	.....
Morris	.....

If you *have not:*

Answered "yes" as to any Defendant in Special Issue No. 2(a), then *do not answer* Special Issues Nos. 6(a) and 6(b).

Plaintiffs also claim damages alleged to have been sustained by them as a result of the infliction of mental anguish upon them.

SPECIAL ISSUE NO. 6(a)

For each of the following Plaintiffs, do you find from a preponderance of the evidence that he or she sustained an emotional injury as a result of seeing the circumstances surrounding the death of James C. Grandstaff?

The term "emotional injury", as used in this issue, includes mental injury, emotional shock or trauma, or mental distress that manifests itself physically.

A physical manifestation is not restricted to what is commonly thought of as physical injury — that is, damage to some physical structure of the body — but extends to nervous disorders and physical and mental ailments resulting from objective fright or mental shock; such as extreme nervousness, severe headaches, severe depression, memory lapses and nightmares.

Answer "yes" or "no".

Sharon Grandstaff	YES
Randy Glenn Gatlin	YES
Charles Robert Gatlin	YES

SPECIAL ISSUE NO. 6(b)

For each of the defendants, if any, for whom you answered "yes" in Special Issue No. 2(a), and for each of the Plaintiffs, if any, for whom you answered "yes" in

Special Issue No. 6(a), do you find from a preponderance of the evidence that the Defendant's use of deadly force against James C. Grandstaff was a proximate cause of the Plaintiff's emotional injury?

The term "emotional injury" has the same meaning in this issue as in Special Issue No. 6(a).

Answer "yes" or "no".

	Sharon Grandstaff	*Randy G. Gatlin*	*C. Robert Gatlin*
Alonzo	Yes	Yes	Yes
Turner	Yes	Yes	Yes
Roberts	Yes	Yes	Yes
Ray	Yes	Yes	Yes
Morris	.....	.....	.....

SPECIAL ISSUE NO. 6.5(a)

Do you find from a preponderance of the evidence that the City of Borger was grossly negligent in failing to properly train its police officers?

Answer "yes" or "no".

ANSWER: Yes

If you have answered Special Issue No. 6.5(a) "yes", then answer Spuecial Issue No. 6.5(b); otherwise, do not answer Special Issue No. 6.5(b).

SPECIAL ISSUE NO. 6.5(b)

Do you find from a preponderance of the evidence that serious incompetence or misbehavior was general or widespread throughout the City of Borger police force?

Answer "yes" or "no".

ANSWER: Yes

If you answered "yes" to Special Issue No. 6.5(b), then answer Special Issue No. 6.5(c); otherwise do not answer Special Issue No. 6.5(c).

SPECIAL ISSUE NO. 6.5(c)

For each of the following types of damages, do you find from a preponderance of the evidence that the City of Borger's gross negligence in failing to properly train its officers was a proximate cause of these damages, if any, sustained by James C. Grandstaff?

Answer "yes" or "no".

(i) Damages resulting from being deprived of liberty without due process of law — No

(ii) Damages resulting from being deprived of life without due process of law — Yes

(iii) Damages resulting from deliberate indifference to his serious medical needs — No

(iv) Damages resulting from the use of excessive force against him — No

SPECIAL ISSUE NO. 7(a)

Do you find from a preponderance of the evidence that James C. Grandstaff was negligent in any of the following respects?

Answer "yes" or "no" as to each one.

(i) Not identifying himself after he got out of his pickup truck Yes

(ii) Not putting his hands up in the air after he got out of his pickup truck Yes

SPECIAL ISSUE NO. 7(b)

If you have answered "yes" to Special Issue No. 7(a)(i) or Special Issue No. 7(a)(ii), do you find from a preponderance of the evidence that such negligence was a proximate cause of the occurrence in question?

Answer "yes" or "no".

ANSWER: Yes

If you have answered "yes" to Special Issue No. 7(b) then you have found James C. Grandstaff at fault and must consider such fault in answering Special Issues Nos. 7(c) and 7 (d).

If you have answered "yes" as to any Defendant in Special Issue No. 1(e), or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(i), then answer Special Issue No. 7(c); otherwise do not answer Special Issue No. 7(c).

SPECIAL ISSUE NO. 7(c)

What percentage of the fault that caused damage to James C. Grandstaff attributable to his deprivation of liberty without due process of law do you find from a preponderance of the evidence is attributable to each of the parties you have found at fault in this respect?

You are instructed that as to each Defendant, if any, for whom you have answered "yes" in Special Issue No. 1(e), or answered "yes" as to City of Borger in Special Issue No. 6.5(c)(i), you have found that Defendant at fault as a matter of law for purposes of this issue and must consider such fault in answering this issue.

You are further instructed that the percentage of fault attributable to a party is not necessarily measured by the number of acts or omissions found.

Answer by stating the percentage, if any, opposite each name. The percentages you find must total 100%.

James C. Grandstaff	.....%
Alonzo	.....%
Turner	.....%
Roberts	.....%
Ray	.....%
Morris	.....%
Borger	.....%
TOTAL	100%

If you have answered "yes" as to any Defendant in Special Issue No. 2 or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(ii), then answer Special Issue No. 7(d); otherwise, do not answer Special Issue No. 7(d).

SPECIAL ISSUE NO. 7(d)

What percentage of the fault that caused damage to James C. Grandstaff attributable to his deprivation of life without due process of law do you find from a preponderance of the evidence is attributable to each of the parties you have found at fault in this respect?

You are instructed that as to each Defendant, if any, for whom you have answered "yes" in Special Issue No. 2(b), or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(ii), you have found that Defendant at fault as a matter of law for purposes of this issue and must consider such fault in answering this issue.

You are further instructed that the percentage of fault attributable to a party is not necessarily measured by the number of acts or omissions found.

Answer by stating the percentage, if any, opposite each name. The percentages you find must total 100%.

James C. Grandstaff	1.0%
Alonzo	2.5%
Turner	2.5%
Roberts	2.5%
Ray	2.5%
Morris	-0-%
Borger	89.0%
TOTAL	100%

If you answered "yes" as to any Defendant in Special Issue No. 4(b), or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(iii), then answer Special Issue No. 7(e); otherwise, do not answer Special Issue No. 7(e).

SPECIAL ISSUE NO. 7(e)

What percentage of the deliberate indifference that caused damage to James C. Grandstaff do you find from a preponderance of the evidence is attributable to each

of the Defendants for whom you answered "yes" in Special Issue No. 4(b), or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(iii)?

Answer by stating the percentage, if any, opposite each name. The percentages you find must total 100%.

Alonzo	.....%
Turner	.....%
Roberts	.....%
Ray	.....%
Morris	.....%
Borger	.....%
TOTAL	100%

If you answered "yes" as to any Defendant in Special Issue No. 5(b), or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(iv), then answer Special Issue No. 7(f); otherwise, do not answer Special Issue No. 7(f).

SPECIAL ISSUE NO. 7(f)

What percentage of the wanton infliction of unnecessary pain that caused damage to James C. Grandstaff do you find from a preponderance of the evidence is attributable to each of the Defendants for whom you answered "yes" in Special Issue No. 5(b), or answered "yes" as to the City of Borger in Special Issue No. 6.5(c)(iv)?

Answer by stating the percentage, if any, opposite each name. The percentages you find must total 100%.

Alonzo .....%
Turner .....%
Roberts .....%
Ray .....%
Morris .....%
Borger .....%
TOTAL 100%

In answering each of the following Special Issues, do not reduce the amounts in your answers because of James C. Grandstaff's negligence, if any.

If you answered "no" as to any Defendant in Special Issue No. 1(b), then answer Special Issue No. 8(a); otherwise do not answer Special Issue No. 8(a).

SPECIAL ISSUE NO. 8(a)

Find from a preponderance of the evidence what sum of money, if any, would have fairly and reasonably compensated James C. Grandstaff for being deprived of his liberty, during his life, without due process of law.

If you did not answer "yes" as to any Defendant in Special Issue No. 1(e), then your answer, if any, under this Special Issue may be some nominal sum such as one dollar.

Answer in dollars and cents, if any.

ANSWER: .....

SPECIAL ISSUE NO. 8(b)

Find from a preponderance of the evidence what sum of money, if any, would have fairly and reasonably compensated James C. Grandstaff for his conscious physical

pain, if any, and mental anguish, if any, suffered before his death as a result of being shot.

Do not include in your answer any amount to compensate for James C. Grandstaff's conscious physical pain, if any, and mental anguish, if any, suffered before his death as a result of deliberate indifference to his serious medical needs.

Answer in dollars and cents, if any.

ANSWER: $100,000.00

If you did not answer "yes" as to any Defendant in Special Issue No. 4(b), then do not answer Special Issue No. 8(c).

SPECIAL ISSUE NO. 8(c)

Find from a preponderance of the evidence what sum of money if any, would have fairly and reasonably compensated James C. Grandstaff for his conscious physical pain, if any, and mental anguish, if any suffered before his death as a result of deliberate indifference to his serious medical needs.

Do not include in your answer any amount to compensate for James C. Grandstaff's conscious physical pain, if any, and mental anguish, if any, suffered before his death as a result of being shot.

Answer in dollars and cents, if any.

ANSWER: .....

If you did not answer "yes" as to any Defendant in Special Issue No. 5(b), then do not answer Special Issue No. 8(d).

SPECIAL ISSUE NO. 8(d)

Find from a preponderance of the evidence what sum of money, if any, would have fairly and reasonably compensated James C. Grandstaff for his conscious physical pain, if any, and mental anguish, if any, suffered before his death as a result of the infliction of unnecessary force on him.

Answer in dollars and cents, if any.

ANSWER: .....

SPECIAL ISSUE NO. 9(a)

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Sharon Grandstaff for her pecuniary loss, if any, resulting from the death of James C. Grandstaff.

Consider the following elements, if any, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Sharon Grandstaff would in reasonable probability have received from James C. Grandstaff during his lifetime had he lived.

Answer in dollars and cents, if any.

ANSWER: $250,000.00

SPECIAL ISSUE NO. 9(b)

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Sharon Grandstaff for her loss of society and companionship, if any, and mental anguish if any, resulting from the death of James C. Grandstaff.

Consider the following elements, if any, and none other: sorrow, mental anguish and grief suffered as a result of his death, and loss of consortium of James C. Grandstaff.

The term "consortium" means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love and felicity necessary to a successful marriage. It does not include services (performance of household and domestic duties) rendered by a spouse to the marriage.

Do not include in your answer any sum to compensate Sharon Grandstaff for her emotional injury, if any, sustained as a result of seeing the circumstances surrounding the death of James C. Grandstaff.

Answer in dollars and cents, if any.

ANSWER: $250,000.00

SPECIAL ISSUE NO. 10(a)

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Jo Cheryl Grandstaff for her pecuniary loss, if any, resulting from the death of James C. Grandstaff.

Consider the following elements, if any, and none other: care, maintenance, support, services, education, advice, counsel, and contributions of pecuniary value that Jo Cheryl Grandstaff would in reasonable probability have received from him during his lifetime had he lived.

Answer in dollars and cents, if any.

ANSWER: $200,000.00

SPECIAL ISSUE NO. 10(b)

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Jo Cheryl Grandstaff for her loss of society and companionship, if any, and mental anguish, if any, resulting from the death of James C. Grandstaff.

Consider the following elements, if any, and none other: sorrow, mental anguish and grief suffered as a result of his death, and loss of the society, affection and companionship of James C. Grandstaff.

Answer in dollars and cents, if any.

ANSWER: $250,000.00

SPECIAL ISSUE NO. 10(c)

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Joe Henry Grandstaff for his pecuniary loss, if any, resulting from the death of James C. Grandstaff.

Consider the following elements, if any, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Joe Henry Grandstaff would in reasonable probability have received from James C. Grandstaff during his lifetime had he lived.

Answer in dollars and cents, if any.

ANSWER: —0—

SPECIAL ISSUE NO. 10(d)

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Joe Henry Grandstaff for his loss

of society and companionship, if any, and mental anguish, if any, resulting from the death of James C. Grandstaff.

Consider the following elements, if any, and none other: sorrow, mental anguish and grief suffered as a result of his death, and loss of the society, affection and companionship of James C. Grandstaff.

Answer in dollars and cents, if any.

ANSWER: $200,000.00.

If you did not answer "yes" on any line in Special Issue No. 6(b), then *do not answer* Special Issue No. 11.

SPECIAL ISSUE NO. 11

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate the following named persons for their emotional injury, if any, sustained as a result of seeing the circumstances surrounding the death of James C. Grandstaff.

Answer in dollars and cents, if any, with respect to each named person, if any, for whom you answered "yes" on one or more of the lines in the column underneath his or her name in Special Issue No. 6(b).

Sharon Grandstaff	$100,000.00
Randy Glenn Gatlin	$25,000.00
Charles Robert Gatlin	$25,000.00

In addition to actual damages, the law permits the jury, if an act was done maliciously, wantonly or oppressively, to award punitive and exemplary damages, in order to punish a wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. Whether or not to make any

award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury. The law requires that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party in the case. Furthermore, it is your duty to give separate, personal consideration to the case of each individual defendant in deciding whether or not to award punitive and exemplary damages, and, if awarded, in fixing the amount.

If you answered "yes" as to any Defendant in Special Issue No. 1(f), then answer Special Issue No. 12(a); otherwise, do not answer Special Issue No. 12(a).

SPECIAL ISSUE NO. 12(a)

For each defendant, if any, for whom you answered "yes" in Special Issue No. 1(f), find from a preponderance of the evidence what sum of money, if any, should be assessed against him as punitive and exemplary damages for his arrest of James C. Grandstaff.

Answer in dollars and cents, if any.

Alonzo .....

Turner .....

Roberts .....

Ray .....

Morris .....

If you answered "yes" as to any Defendant in Special Issue No. 2(g), then answer Special Issue No. 12(b); otherwise, do not answer Special Issue No. 12(b).

SPECIAL ISSUE NO. 12(b)

For each defendant, if any, for whom you answered "yes" in Special Issue No. 2(g), and for each Plaintiff listed, find from a preponderance of the evidence what sum of money, if any, should be assessed against him as punitive and exemplary damages for his use of deadly force against James C. Grandstaff.

Answer in dollars and cents, if any.

SHARON GRANDSTAFF:

Alonzo	$3,000.00
Turner	$3,000.00
Roberts	$3,000.00
Ray	$3,000.00
Morris	

JO CHERYL GRANDSTAFF:

Alonzo	$3,000.00
Turner	$3,000.00
Roberts	$3,000.00
Ray	$3,000.00
Morris	

JOE HENRY GRANDSTAFF:

Alonzo	$1500.00
Turner	$1500.00
Roberts	$1500.00
Ray	$1500.00
Morris	

If you answered "yes" as to any Defendant in Special Issue No. 4(a), then answer Special Issue No. 12(c); otherwise, do not answer Special Issue No. 12(c).

SPECIAL ISSUE NO. 12(c)

For each defendant, if any, for whom you answered "yes" in Special Issue No. 4(a), find from a preponderance of the evidence what sum of money, if any, should be assessed against him as punitive and exemplary damages for his deliberate indifference to James C. Grandstaff's serious medical needs.

Answer in dollars and cents, if any

Alonzo .....

Turner .....

Roberts .....

Ray .....

Morris .....

If you did not answer "yes" as to any Defendant in Special Issue No. 5(c), then do not answer Special Issue No. 12(d).

SPECIAL ISSUE NO. 12(d)

For each Defendant, if any, for whom you answered "yes" in Special Issue No. 5(c), find from a preponderance of the evidence what sum of money, if any, should be assessed against him as punitive and exemplary damages for his use of excessive force on James C. Grandstaff.

Answer in dollars and cents, if any.

Alonzo .....
Turner .....
Roberts .....
Ray .....
Morris .....

FILED
APR 24
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO; BORGER POLICE OFFICER JOHN WAYNE TURNER; BORGER POLICE OFFICER BAILEY HAL ROBERTS; AND BORGER POLICE OFFICER JOHN RAY,
Petitioners

v.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LaJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J. H. GRANDSTAFF,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLINARD J. HANBY
HAYNES & FULLENWEIDER
4300 Scotland
Houston, Texas 77007
(713) 868-1111

Attorneys for Respondents

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
JURISDICTION	2
REASONS A WRIT OF CERTIORARI SHOULD BE DENIED	2
A. STATEMENT OF FACTS	2
B. ARGUMENT	4
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

CASES	Page
Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 54 U.S.L.W. 3594 (March 10, 1986)	17, 19
Monell v. Department of Social Services, 436 U.S. 658 (1978)	4
Oklahoma City v. Tuttle, ____U.S.____, 85 L.Ed.2d 791 (1985) 4, 5, 8, 16, 17, 18, 19
Pembaur v. City of Cincinnati, 54 U.S.L.W. 4289 (March 25, 1986)	4, 18

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO; BORGER POLICE OFFICER JOHN WAYNE TURNER; BORGER POLICE OFFICER BAILEY HAL ROBERTS; AND BORGER POLICE OFFICER JOHN RAY,
Petitioners

v.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LaJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J. H. GRANDSTAFF,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable United States Supreme Court:

SHARON GRANDSTAFF, et al. file the following Brief in Opposition to the Petition for a Writ of Certiorari filed by THE CITY OF BORGER, TEXAS, et al.:

JURISDICTION

Respondents do not contest the jurisdiction of this Court over this case.

REASONS A WRIT OF CERTIORARI SHOULD BE DENIED

A. Statement of Facts:

The opinion of the Court of Appeals contains an accurate synopsis of the facts of this case. 767 F.2d 161, 165. The statement of facts provided in the Petition for a Writ of Certiorari is inaccurate in numerous particulars. Some of the more glaring errors are as follows:

1. "The suspect fired on the officers . . ." (Pet. for Cert. at 3): Actually, there was a serious dispute throughout the trial concerning whether the suspect, Lonnie Cox, ever fired a weapon. (*See*, e.g., R. 707, 1847, 1960-1961); *see* Court of Appeals opinion, 767 F.2d at 171.

2. "One or more of the officers had seen a man exit from the truck and move in a westerly direction toward the point where shortly thereafter a second pickup truck began to proceed down the caliche road toward the line of Borger patrol cars . . ." (Pet. for Cert. at 4): This is misleading. In fact, it was overwhelmingly established at trial that the claim of some of the officers, particularly Officer Turner, to have seen Lonnie Cox exit his pickup and approach the second pickup was a pure fabrication made in a desperate attempt to justify firing at the second pickup. (*See*, e.g., R. 734-735).

3. "A single shot was fired, followed by a volley of shots from several officers, including but not limited to

the Borger police officers." (Pet. for Cert. at 5): This is false. There was no evidence whatsoever that anyone other than a Borger police officer fired a shot in the direction of James Grandstaff.

4. "The party later identified as James C. Grandstaff did not comply with the officers' instructions to get his hands up and identify himself, but instead started making movements around his waist area like he was going for a pistol." (*Id.*): This is partially misleading and partially false. There was a vigorous dispute at trial concerning whether any such warnings were given. (*See*, e.g., R. 1382). In fact, the physical evidence was almost conclusive that the attack by the Borger officers upon James Grandstaff began while he was still in his truck. Thus, at least four shots were fired at the truck from short range as it moved slowly down the road. (R. 2365, 2382-2383, 2427). James Grandstaff was shot in the back with a high-powered rifle shortly after he exited his vehicle. (R. 315, 796). The bullet traveled in an upward direction through the body *parallel* to the spine. (R. 315). Thus, James Grandstaff was probably on his hands and knees at the time he was shot. (R. 336-337). Officer Ray's contention that Jim Grandstaff was upright and making movements as if to pull a weapon at the time he was shot is simply another of the transparent lies told by the Borger officers, and condoned by the City, throughout the course of this litigation. Even one of the other Borger officers contradicted his testimony. (R. 1152).

Additional facts and references to the record will be supplied with the argument.

B. Argument:

In *Monell v. Department of Social Services,* 436 U.S. 658 (1978) this Court established that a municipal government is a "person" within the meaning of § 1983. Thus, a municipality can be sued where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that bodies' officers." *Id.* at 690. Furthermore, a municipality may be sued for constitutional deprivations "visited pursuant to governmental 'custom' even though such a custom has not received fomal approval through the bodies' official decision-making channels." *Id.* at 691.

In *Oklahoma City v. Tuttle,* ____U.S.____, 85 L.Ed.2d 791 (1985) this Court took what was described as a "small but necessary step" toward clarification of the meaning of the word "policy" in *Monell.* There, this Court held that a single incident involving a single non-policy making officer was insufficient to establish the liability of the municipality under § 1983. 85 L.Ed.2d at 804-805.

More recently, this Court has taken an aditional step toward clarifying *Monell.* In *Pembaur v. City of Cincinnati,* 54 U.S.L.W. 4289 (March 25, 1986) this Court has held that a single directive from a *policy-making* officer is sometimes sufficient to establish the liability of the municipality under § 1983. This Court went on to clarify that: "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 4292 (emphasis in original).

In the present case, the Petitioners bring forward no challenge to the instructions to the jury. Instead, they bring forward only a question concerning the sufficiency of the evidence. Thus, the true issue presented for review is whether any rational trier of fact could conclude that the tragedy involved in this case was caused by the acts of the City of Borger itself. The evidence on this issue was almost overwhelming.

The Recruitment and Training Policies of the City of Borger[1]

Police officers for the City of Borger were hired by a review board consisting of the assistant City Manager, the Chief of Police and a police lieutenant. (R. 2486). The board orally interviewed the applicants. (*Id.*) No questions were customarily asked concerning the penal code or law enforcement procedure. (R. 2486-2487). No competency tests, personality tests, or psychological examinations were administered. (R. 2487-2488). The only stated requirement to be hired as a police officer was either a high chool dipolma or one semester of college. (R. 2490). However, one of the officers involved in this incident was apparently not a high school graduate. (R. 2524). An officer was not even required to obtain

1. In *Oklahoma City v. Tuttle, supra,* at n. 7, this Court reserved the question of whether grossly negligent training of a single officer could give rise to municipal lability. This record contains evidence of grossly negligent recruiting, training, and supervision of the *entire police force*. Furthermore, the evidence regarding recruitment, training, and supervision is only the first link in the chain that leads inevitably to the conclusion that the death of Jim Grandstaff was the fault of the City of Borger. The comparative fault issue, submitted to the jury for purposes of the pendent state law claims, accurately sets forth the position of Respondents: 1% the fault of James Grandstaff; 3% the fault of each of the individual defendants; and 89% the fault of the City of Borger itself.

basic certification from the State until 12 months *after* he was hired. (R. 2490). Thus, an applicant need not have attended the police academy. (*See* Tex. Rev. Civ. Stat. Ann. art. 4413(29aa), Sec. 6). Little or no effort was made to determine the academic performance of those applicants who had attended the academy. (R. 2495). The police applicants were asked basically the same questions as the secretarial or even waste disposal applicants. (R. 2493-2494).

The City Council had no policy requiring training by the City of its officers. (R. 2510-2511). The council did not require any periodic proficiency tests, written or oral, of the officers. (R. 2511). No tests were required regarding knowledge of the penal code (R. 2266), citizens' rights (R. 2267), or arrest procedures. (R. 2511). No training was required in the use of police equipment. (*Id.*). No training was required on when it was appropriate to resort to deadly force. (R. 2512). In fact, no effort was even made to make the police officers aware of any available courses in law enforcement. (R. 2513). Full control of the police department and the entire subject of police training was totally delegated to the Chief of Police. (R. 2496-2508, 2511-2512, 2555).

The training which the Chief, in fact, provided was essentially non-existent. The officers on duty testified that they had received no training whatsoever from the City of Borger. (R. 605, 2068). Specifically, they had received no instruction on when it was proper to use deadly force. (R. 440, 1081, 2251, 2274). There was no training in the use of weapons. (R. 676, 712, 2251). There was no training whatsoever on high speed chases or when to use a weapon during such a chase. (R. 1083,

2255, 2267). There was no training on how to handle an arrest or when force could be used during an arrest. (R. 1083, 2278).

The statements made by the officers on the witness stand revealed incredible incompetence and gross disregard for human life. Officer Roberts testified it was proper to *open fire* if a person refused to get out of a vehicle in response to a police order. (R. 516). Officer Turner testified that it was perfectly proper to fire on a suspect even though no weapon could be seen. (R. 826). He stated that this was the policy of the City of Borger. (*Id.*). Officer Ray saw nothing wrong with firing at a suspect's vehicle even though it was in front of a farmhouse. (R. 991). Officer Alonzo could find nothing wrong with the use of gunfire in the presence of innocent bystanders. (R. 2270).

The officers were unanimous in their testimony that Borger's only stated policy on the use of deadly force was to "follow the penal code." (R. 440, 964, 1086, 2068). This policy was promulgated by the Chief of Police. (R. 2069). Thus, so long as their conduct fell short of criminal responsibility, the officers were in compliance with the stated policy of the City of Borger; Borger required no stiffer standard. (R. 1090-1091). Each of the officers further testified that *all* of their conduct on August 11, 1981, comported with the policies of the City of Borger. (R. 826, 963, 1081-1082, 1087, 2067; *see* R. 423, 442). There was absolutely no evidence to the contrary.

Supervision Policies of the City of Borger

The on-duty Borger police force on the morning of August 11, 1981, consisted of six officers. (R. 608).

Although some had previous law enforcement experience, they were largely untested at Borger. The most senior officer on duty had been on the force for eight months. (R. 2053). One of the remaining officers had been on the force for five months (R. 860), one for four months (R. 604), two for two months (R. 388, 1102), and one for two days (R. 676). It was the regular night off of Lieutenant Poston, who was normally in charge of the shift. (R. 1106). It was also the regular night off of Officers Lemry and Krueger, who were normally the senior officers on the shift. (R. 2053-2054). Furthermore, the City of Borger failed to take even the simple step of designating one of the six rookie officers to be in charge. Even this might have avoided the tragedy.[2]

The inevitable result of the policies of haphazard recruiting, no training, and no supervision was a time bomb waiting to explode. The bomb exploded on August 11, 1981.

Events of August 11, 1981

Petitioners, in an effort to bring this case within the bounds of *Oklahoma City v. Tuttle, supra,* choose to classify this case as involving a single "incident." *Tuttle* involved a single "incident" in the precise sense of the word. The only conduct which could be faulted was a single shot by a single officer. The present case cannot be characterized as a single "incident." Instead, there were a series of episodes on the morning in question. The conduct of the Borger officers during each of the episodes was simply outrageous:

---

2. Davis said Alonzo was in charge. (R. 608, 614). Alonzo said Davis was in charge. (R. 2054). Ray and Schultz did not know who was in charge. (R. 976, 1104). Roberts really did not know who was in charge, but "guessed" that Davis was. (R. 530-531).

The Chase

The "incident" began when Officers Roberts, Turner and Davis attempted to apprehend Lonnie Cox. (R. 409, 614). Cox was supposedly wanted for grand larceny in Oklahoma, but the officers had no arrest warrant. (R. 1552-1553). The officers had also been advised that Cox might have a kidnap victim with him. (R. 1563). Cox refused to stop his vehicle and led the three officers on a chase at speeds exceeding 90 miles per hour. (R. 416-418). The three remaining Borger officers on duty joined in the chase within the next few minutes. (R. 615, 1118, 2076).[3]

At some point in the chase, Roberts helped Turner load an automatic rifle and instructed Turner to fire at Cox. (R. 421).[4] Turner did so. (R. 429). Davis directed Ray, who was directly behind Cox to also fire at the pickup. (R. 616, 899). Ray, a right-handed person, then began shooting his .357 magnum with his left hand while driving with his right hand. (R. 900). Each of the officers admitted that he was unable to tell how many people were in the truck they were pursuing. (R. 416, 728, 869). The officers believed that Cox might have a kidnap victim with him. (R. 417, 728). Furthermore, there were numerous farmhouses in the area. (R. 1581). Nevertheless, the officers did not attempt to shoot a tire; they aimed for the cab of the truck, running the risk of hitting the possible kidnap victim in the cab

3. Even if the gunfire is disregarded, the manner in which the chase was conducted itself displayed a reckless disregard for human life. For no apparent reason, Roberts chose to drive in excess of 90 miles per hour on the wrong side of a divided highway in the dark. (R. 418).

4. As noted earlier, there was a dispute at trial concerning whether Cox fired first.

or other innocent parties further down the highway. (R. 726-728). At the time, none of the officers gave any thought to the risk. (R. 442, 727-728; *see* R. 616, 903).

Thus, the Borger officers displayed reckless disregard for human life throughout the chase. There was evidence from which the jury could infer that the Chief of Police was listening to all of this on the radio. (R. 1212, 1229, 1254, 2055). He gave the officers no instructions.

Events on the Ranch Prior to the Shooting

Cox was eventually shot in the back; he drove off of the highway, crashed through a fence, and brought his truck to a stop within approximately 100 feet of the house where the Grandstaffs lived. (R. 435-436, 1716-1717; *see* PX-8A). The Borger officers continued their pursuit and, despite the farmhouse which was plainly visible directly behind the truck, again opened fire at the Cox truck. (R. 459). One of the officer's bullets actually hit the Grandstaff home. (R. 2325). The bullet penetrated the exterior wall of the living room and traveled toward the bedrooms. (R. 266). Sleeping in the bedrooms were a man, a woman, and three children. (R. 223-224). A scientific analysis of the bullet path showed that it had been fired from a distance of *at most* 75 feet. (R. 2374).[5] The total disregard for human life continued; the proximity of the scene to the farmhouse was broadcast on the radio (R. 1580); the Chief of Police *still* gave no instructions.

5. The bullet in question was of a somewhat unusual caliber .41. (R. 2325). Officer Roberts was the only one on the scene who had a weapon capable of firing that bullet. (R. 456, 1912). In yet another incredible lie by the Borger officers, Roberts denied firing the weapon in question. (R. 455).

The Shooting Itself

At some point in this rain of gunfire, Cox had managed to get out of his truck and escape. (R. 447). Cox apparently left the truck out of gear, and it rolled backwards and to the east, coming to rest near a fence some 400 to 500 feet from the house. (R. 460; PX-8A). Officers Roberts and Alonzo went to investigate the truck. (R. 488, 2105). It was apparent from the bullet-hole in the driver's seat and the blood all over the truck that Cox had been hit and was seriously wounded. (R. 494). Roberts and Alonzo had a walkie-talkie available to broadcast this fact to the other four officers, but apparently did not do so. (*See* R. 505-506).

At approximately this point, James Grandstaff left his house; he stated that he was going to help the police. (R. 230). He drove his pickup truck slowly down the road toward the police cars. (R. 231). Although it was apparent that the driver of the second pickup was probably not Lonnie Cox (R. 1221, 1223, 1603),[6] either Alonzo or Roberts or both opened fire on the second pickup as it went slowly past them in the direction of the other officers. (R. 2382-2383, 2427). James Grandstaff, who, perhaps, believed that the fugitive was firing at him, drove his truck off the road to the opposite side of the police cars from the source of the gunfire. (R. 1371, 1373). As James Grandstaff got out of his truck, Officers Ray and Turner also opened fire at him. (R. 790, 792, 1005). James Grandstaff probably crouched on the ground behind the door of his truck to avoid this gunfire. (R. 336-337, 2395). In the meantime, Officer

6. The dispatch log indicates that the following was broadcast on the radio: "Car coming out from house. Don't know if it will be people." *Still* no instructions from the Chief.

Alonzo apparently crossed to the other side of the road, crept up behind James Grandstaff, and shot him in the back from a range of 20 to 30 feet. (R. 2391-2392).

The Mythical "Warning" Shot

Deputy Morris of the Hutchison County Sheriff's Department arrived on the scene very shortly after the shooting. He testified that he heard a *single* shot as he was turning onto the road. (R. 1585). Morris did not hear the earlier volley of shots, and it seems likely that this final, isolated shot was the one that killed James Grandstaff. At trial, five of the six Borger officers offered an explanation of this shot. They testified that Officer Davis fired a "warning shot" into the ground next to James Grandstaff before the officers handcuffed him. (R. 538, 626, 800, 1042, 2211). It is highly unlikely that any such shot was fired. The statements given by Turner, Ray and Alonzo immediately after the shooting do not mention such a shot. (R. 801, 1042, 2212). Alonzo's deposition does not mention any such shot. (R. 2215). One of the Borger officers, Schultz, denied at trial that any such shot was fired. (R. 1160). Deputy Hart of the Carson County Sheriff's Department who had also arrived on the scene by this time denied that any such shot was fired. (R. 1395). A later search of the area with a metal detector did not reveal a buried slug. (R. 2347). The jury was free to interpret the motives of the five officers who intentionally invented this gruesome story of firing a "warning" shot into the ground next to a man who was flat on his face bleeding to death.

The Immediate Aftermath of the Shooting

When the gunfire had ceased, all of the Borger officers approached the Grandstaff truck. (R. 526, 624, 797,

1033, 1148, 1388, 1600). They found a man lying on his stomach with a bullet wound in his back groaning in obvious pain. (R. 532, 624, 1047). One of the officers testified that James Grandstaff immediately informed them that they had shot the wrong man. (R. 804). Nevertheless, Officer Roberts, who weighed 330 pounds, sat on top of the man and handcuffed his hands behind him. (R. 1039). The officers then dragged him up to the front of his truck. (R. 547).

James Grandstaff was left there with his hands cuffed behind him and his face in the dirt. (R. 557). He tried to get up on several occasions and stated that he wanted to go home. (R. 570, 627, 2235-2236). A law enforcement officer from another jurisdiction who arrived on the scene perhaps five minutes after the shooting testified that he twice saw Borger Officer Davis place his foot on the side of James Grandstaff's face and shove it back into the dirt. (R. 1516-1519). None of the other Borger officers took any steps to prevent this. Eventually, all of the Borger officers admittedly knew that they had shot the wrong man. (R. 564-565, 627, 1058-1059, 1401, 2234). Nevertheless, James Grandstaff remained handcuffed until he bled to death. (R. 311-312).

The Surrender of Cox

Later that morning, Lonnie Cox voluntarily surrendered. (R. 582). He was unarmed and seriously wounded. (R. 583). There was evidence in the record showing that he was also mistreated by the Borger police after he surrendered. (R. 584-585; PX-100).

The Cover-Up

As the trial progressed, it became increasingly obvious that, before the scene was investigated, someone tampered

with the evidence in an effort to corroborate the stories told by the Borger officers and justify their conduct:

1. The bullet hulls near where the Cox truck first came to a stop: The scene investigator found 15 spent rifle cartridges in the pasture to the east of the road and approximately 778 feet from the highway. (R. 1710-1711). Skid marks (which, presumably, marked the point where Cox stopped the truck for the first time) were found in the grass about a car length west of the cartridge cases. (R. 1716-1717). Superficially, these cartridges seem to substantiate the contention of the Borger officers that Cox had fired at them after he exited from his truck. (*See, e.g.,* R. 447). A ballistics expert verified that 14 of these 15 cartridges had, indeed, been fired from the weapon originally possessed by Cox, but later confiscated by Alonzo. (R. 2318). However, one of the 15 cartridges had been fired from a weapon owned by Officer *Roberts* which had never been in the possession of Lonnie Cox. (*Id*).[7] There were other considerations which make it self-evident that the 15 cartridges in question were "supplied" to the scene. The officers uniformly testified that Cox ran to the west when he exited his truck. (R. 451-

---

7. Ranger Gillespie made the following confused comments at trial about the latter cartridge:

> Now whether they was mixed up in packaging. I have wondered how that got up there. But at a scene like that, when you have got people wandering around, somebody's liable to pick something up, wander around, look down, whoops, I've got that in my hand. I'm going to throw it down.
>
> There is no way . . . I don't understand what that was doing up there.

(R. 2024).

454, 620, 737, 940). The spent cartridges were found a car length east of the skid marks. (R. 1716-1717). Thus, the officers' testimony required that the spent cartridges from the weapon in question eject 15 or 20 feet to the right with the truck in the way. The weapon in question does not eject that far. (R. 2385). Furthermore, the truck was found completely enclosed with the weapon *inside*. (R. 502). Thus, in order to substantiate the officers' story, Cox would had to have exited the truck, fired his weapon 15 times, thrown the weapon back into the cab of the truck, and shut the door, all before the truck rolled back down the hill. These considerations, together with the cartridge from the wrong weapon, make it certain that the fifteen spent cartridges were planted.

2. The spent cartridges in the truck. Two spent cartridges from the same weapon were found inside the Cox truck. (R. 2319-2320). Superficially, these cartridges substantiated the officers' testimony that Cox fired at them from the truck during the chase. However, Cox would have had to hold his rifle upside down to have fired from his window and left those cartridges. (R. 1960). The hot cartridges would have come back in his face. (R. 1961). These two cartridges were also "supplied" to the scene.

3. The dispatch tape: This would have documented exactly what was said over the radio during the events in question and proved or disproved the exact extent to which the Chief of Police was himself a participant. The recorder allegedly malfunctioned that night. (R. 1187). The tape record-

ing in question mysteriously disappeared. (R. 1195).

There was evidence at trial which strongly suggested that the person who manipulated the evidence was the Chief of Police himself. (R. 2248). The City rested without presenting any defense and did not call the Chief as a witness.

The Reaction of the City of Borger

It was obvious on August 12, 1981, that a man was dead without justification, that a Borger officer had shot him, and that the statements given by the Borger officers could not be reconciled with the autopsy or other physical evidence. Nevertheless, none of the officers involved in the incident was ever reprimanded or punished in any way. (R. 832). The Chief of Police did not even criticize their conduct. (R. 1079, 2260). Indeed, each of the officers involved received a raise shortly after the incident. (R. 2500).

Analysis

Petitioners rely primarily on *Oklahoma City v. Tuttle, supra.* The only similarity between the present case and *Tuttle* is that the police killed someone. The dissimilarities between the two cases can be readily listed:

1. *Tuttle* involved a single police officer. The fact that a single officer acted in a certain manner is certainly insufficient to support any inference that the policymakers condoned, approved, or encouraged his conduct. If several officers on a large police force behave in an unreasonable manner, the question of whether the trier of fact can thereby infer

that the policymakers approved of the conduct becomes closer. This Court has recently granted review in a case presenting that issue. *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 54 U.S.L.W. 3594 (March 10, 1986). The present case is at the far end of the same spectrum. When *all* of the officers who are on duty behave in the same outrageous manner, the inference that the policymakers condoned, approved, or encouraged that type of conduct becomes almost compelling.

2. *Tuttle* involved a single incident in the precise sense of the word. The only conduct of which complaint could be made was a single gunshot. A single shot can be fired in a moment of panic or a moment of anger. A single shot does not begin to support any inference that a policymaker condoned, approved, or encouraged it. Once again, the *Kibbe* case falls in the middle of the spectrum. There, the record shows five to ten shots by at least three different officers that a reasonably competent police officer would not have fired. Possibly, this supports an inference that the policymakers approved. Again, this case lies at the far end of the spectrum. This record shows an uncounted number of shots fired in a manner which displayed a total disregard for the lives of innocent bystanders. There were the numerous shots fired from speeding police vehicles in a populated area during the chase. There were numerous shots fired in the direction of a farmhouse at the scene. Finally, there was the rain of gunfire that killed James Grandstaff. The officer in *Tuttle* and the officers in *Kibbe* fired with pistols.

Some of the present officers fired pistols, but three fired high-powered automatic rifles, virtual machine guns. These weapons were not fired into the ground; they were capable of killing unknown people miles away. Furthermore, the outrageous behavior in this case was not limited to gunfire. There can be no justification for the manner in which James Grandstaff was treated after he was shot. Officer Davis' conduct of twice putting his foot in the face of a dying man and shoving it back into the dirt can only be described as sadistic. None of the other officers intervened. In short, this record reveals infinitely more than the sudden act of panic or anger revealed by the record in *Tuttle*. Thus, there is a much stronger inference that the policymakers approved of such conduct.

3. In *Tuttle* there was absolutely no evidence that any policymaker was aware of the tragedy as it occurred. In the present case, the record strongly suggests that one of the policymakers, Chief of Police Arthur Waite, was aware of the gunfire along the highway and was aware that his officers were firing weapons in the vicinity of a farmhouse. Nevertheless, he did not call off the chase or give any instructions whatsoever to the officers. This Court has recently decided in *Pembaur v. City of Cincinnati, supra*, that a single order from a policymaker can constitute policy. Likewise, when a policymaker perceives an outrage developing and fails to take steps to prevent it, this is additional strong evidence to support a finding of municipal liability.

4. The *Tuttle* case involved no evidence that the policymakers had condoned the conduct of the

officer after the fact. Indeed, such evidence would have been of little relevance because the jury found the officer to have acted in good faith and exonerated him. Here, the officers committed an absolute outrage and proceeded to give statements concerning their conduct which could be exposed as baldfaced lies by even a cursory examination of the physical evidence. Not a single officer was terminated, suspended, or even reprimanded. The Chief of Police did not even criticize their conduct. Every officer involved was given a raise less than two months after the outrage. Worse still, one of the policymakers apparently attempted to manipulate the evidence to justify the conduct of the officers. The fact that the policymakers reacted in this manner in the face of a series of incidents of the magnitude revealed in this record strongly supports the inference that this was and had always been their policy.

5. There was no testimony in *Tuttle* from the officer involved concerning his understanding of the city policies. In the present case, each of the officers involved testified that *all* of their conduct on the morning in question was in accordance with city policy. The City of Borger called no witnesses to dispute this testimony. Non-policymaking employees cannot make policy, but surely they are competent to testify what the policy is.

6. Finally, in *Tuttle* this Court expressly reserved ruling on the question of whether grossly negligent training of a single officer was a sufficient basis for municipal liability. The *Kibbe* case involves a question of gross negligence in training the

police, and this Court will, perhaps, resolve the issue there. The present record contains evidence revealing grossly negligent recruiting, training, and supervision of the entire police force. This case does not present the question of whether such evidence could *alone* support municipal liability. Petitioners have not preserved or brought forward such a contention. Nevertheless, this evidence certainly adds further weight to the inference that the policymakers approved and encouraged outrageous behavior by the police.

Conclusions

This case does not present a close question. The evidence that the City of Borger itself was at fault is overwhelming. Furthermore, the facts and circumstances of this case are so unique that a review by this Court is unlikely to set any meaningful precedent. The record fully justifies the statements of Judge Reavley for the Court of Appeals:

> Our reading of this long trial record reveals how officers and a city police force failed, at great cost, and how those officers and their supervisors thereafter denied their failures and concerned themselves only with unworthy, if not despicable, means to avoid liability. The City and officers insist, to this day, that they are free of fault and deserve no blame. They display no sense of obligation other than to this joint disclaimer and defense. There is not a single word in this record about any effort at any time by the City of Borger to avoid police failure or abuse. The officers, called to the witness stand by the plaintiffs, were evasive and forgetful and self-contradictory. The scene at the 6666 Ranch that

> dark night in 1981 was distressing; succeeding events, the scene of this trial, and the posture of the defense only exacerbate the distress.

767 F.2d at 166. Likewise, a review by this Court would serve no useful purpose; it would only serve to extend the tragedy. The Petition for Certiorari should be denied.

Respectfully submitted,

HAYNES & FULLENWEIDER
A Professional Corporation

By: _____
CLINARD J. HANBY
State Bar #08880500

4300 Scotland
Houston, Texas 77007
(713) 868-1111

Attorneys for Respondents

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been served by _____ to _____ on this _____ day of April, 1986.

_____

Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1585

IN THE

Supreme Court of the United States

October Term 1985

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO; BORGER POLICE OFFICER JOHN WAYNE TURNER; BORGER POLICE OFFICER BAILEY HAL ROBERTS; AND BORGER POLICE OFFICER JOHN RAY,

Petitioners,

vs.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LAJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J.H. GRANDSTAFF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER, CITY OF BORGER, TEXAS

RILEY EUGENE FLETCHER
Special Counsel
Texas Municipal League
211 E. 7th, Suite 1020
Austin, Texas 78701
(512) 478-6601

Attorney for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE. . . .	1
STATEMENT OF THE CASE.	1
SUMMARY OF THE ARGUMENT.	2
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES	Page
Andersen v. U.S., 417 U.S. 211, 94A S.Ct. 2253 (1974)	6
City of Oklahoma City, Oklahoma v. Tuttle, ____ U.S. ____, 105 S.Ct. 2427 (1985).	3,4,5,7
McDonald Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973)	6
Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978)	3
Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982)	6

Page

Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985), *pet. for rehearing denied*, ____ F.2d ____ (1986). 2,5,6

Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980) 6

STATUTES

42 U.S.C. sec. 1983 1,2,3,6

IN THE

Supreme Court of the United States

October Term 1985

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO; BORGER POLICE OFFICER JOHN WAYNE TURNER; BORGER POLICE OFFICER BAILEY HAL ROBERTS; AND BORGER POLICE OFFICER JOHN RAY,

Petitioners,

vs.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LAJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J.H. GRANDSTAFF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER, CITY OF BORGER, TEXAS

INTEREST OF THE AMICUS CURIAE

The Texas Municipal League is a non-profit association of more than 900 Texas municipalities. Each of its member cities is a political subdivision of the State of Texas. *Amicus curiae* is affected by the holding of the Court of Appeals for the Fifth Circuit in that the opinion greatly expands the potential liability of cities under 42 U.S.C. sec. 1983 for acts of their employees or agents.

Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

On the night of August 10, 1981, while searching for a kidnapping suspect, officers of the City of Borger, Texas, Police Department shot and killed James C. Grandstaff. His widow, child, and step-children sued the officers and

the City of Borger pursuant to 42 U.S.C. sec. 1983. The jury found that "the City of Borger was grossly negligent in failing to properly train its police officers in that serious incompetence or misbehavior was general or widespread throughout the City of Borger police force." *Grandstaff v. City of Borger, Texas,* 767 F.2d 161, 170 (1985). On appeal, the Court of Appeals for the Fifth Circuit found that there was no evidence of prior misconduct within the Borger police force. 767 F.2d 161, 171. The Court of Appeals, however, held that a pre-existing city policy can be inferred from a city's post-event failure to discipline its employees following a single incident of misconduct. 767 F.2d 161, 171.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fifth Circuit erred in holding that a pre-existing city policy can be inferred from a city's post-event failure to discipline its employees after a single incident of misconduct.

ARGUMENT

Respondents brought this suit pursuant to 42 U.S.C. sec. 1983 which provides, *inter alia*, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." A city may be held liable in a sec. 1983 action if an employee causing an injury acts in execution of a policy or custom of the city at the time the injury is inflicted. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

The vicarious liability rule was developed further by This Court in *City of Oklahoma City, Oklahoma v. Tuttle*, ____ U.S. ____, 105 S.Ct. 2427 (1985).

In *Tuttle*, the plurality opinion made a distinction between policies and customs that were in and of themselves unconstitutional and policies and customs that were not inherently unconstitutional. ____ U.S. ____, 105 S.Ct. 2427, 2436. After making the distinction, the plurality stated that "Where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." ____ U.S. ____, 105 S.Ct. 2427, 2436.

In the case at bar, the Respondents did not allege that the City had adopted an unconstitutional policy. Instead, Respondents contend that the City of Borger is liable because it was grossly negligent in failing to properly train its police officers, resulting in serious incompetence or misbehavior general or widespread throughout the City police force. Under the plurality

opinion in *Tuttle*, therefore, Respondent was required to produce substantial proof of the requisite fault on the part of the municipality, and the causal connection between the policy and the constitutional deprivation.

There was no evidence of prior misconduct within the Borger Police Department and this lack of evidence was noted by the majority in its opinion in the Court of Appeals. 767 F.2d 161, 171. The majority takes note that "Isolated incidences of police misbehavior are inadequate to prove the knowledge and acquiesence by a city policymaker." 767 F.2d 161, 171.

The majority concludes that a policy of the Borger Police Department may be inferred from the fact that following the night in question, there were no reprimands, discharges, or admissions of error. 767 F.2d 161, 171. This post-event failure to discipline the police officers constitutes no evidence of a before-the-fact policy of illegal conduct. Although such failure might be

evidence of a policy commencing from that point in time when no discipline was invoked, it is no evidence of a prior existing policy. *See*, Dissenting Opinion on Petition for Rehearing and Suggestion for Rehearing en banc, *Grandstaff v. The City of Borger, Texas*, ____ F.2d ____, (1985); *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982); *Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980), *cert denied*, 449 U.S. 1016 (1980).

The majority opinion in the Court of Appeals relies on *Andersen v. U.S.*, 417 U.S. 211, 94A S.Ct. 2253 (1974) and *McDonald Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), in support of its decision that proof of post-event conduct in a sec. 1983 case is sufficient to uphold a jury finding of a pre-event policy. These cases are inapposite. They show only that motive in a Title VII suit may be shown by subsequent conduct and that criminal conspiracy may be proved by subsequent acts. Neither case addresses the measure of evidence necessary to prove the

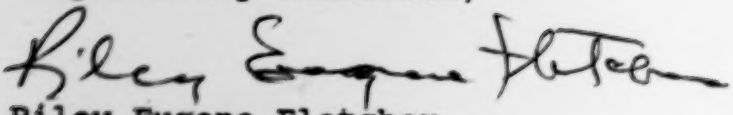
existence of a city policy which is not itself unconstitional. See *City of Oklahoma City, Oklahoma v. Tuttle*, ____ U.S. ____, 105 S.Ct. 2427, 2436 (1985).

In summary, Respondents failed to show that the City caused Respondents' damages because it was not shown that there was a city policy within which the police officers were acting. Such a policy cannot be inferred from a City's post-event failure to take disciplinary action in response to a single incident of employee misconduct.

CONCLUSION

For the foregoing reasons, a *writ of certiorari* to the Court of Appeals for the Fifth Circuit should be granted, and, upon hearing thereof, the judgment of the Court of Appeals for the Fifth Circuit should be reversed as to the liability of the City of Borger, Texas.

Respectfully submitted,



Riley Eugene Fletcher
Special Counsel
Texas Municipal League
211 E. 7th, Suite 1020
Austin, Texas 78701
(512) 478-6601

April 30, 1986